82-1527

No. 82-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE ASSOCIATED PRESS,

Petitioner,

—against—

CHARLES J. BUFALINO, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

This libel case involves news dispatches which disclosed the sources of campaign contributions in a 1978 gubernatorial race. The reports revealed that the successful candidate for governor of Pennsylvania had accepted political contributions from individuals having alleged mob ties. One of those individuals was respondent, a local public official. The dispatches were based on information provided by state law enforcement agency officials which was fully documented in the files of the agency. The dispatches accurately reflected information contained in the agency's files, as well as federal law enforcement agency files, United States Senate subcommittee reports, judicial and quasi-judicial proceedings and other official records. The precise questions presented are:

1. Whether the rule in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), applies to news dispatches concerning campaign contributions to a candidate for high public office in a libel suit by a contributor whose identification is integral to the reports.

2. Whether such news dispatches alleging that the contributor, a local public official, had underworld connections fall outside the protection of *New York Times Co.* v. *Sullivan*, *supra*, because the news reports do not identify the contributor's public office.

3. Whether the First Amendment protects from liability for defamation news accounts which accurately summarize official reports.

4. Whether the court of appeals' failure to defer to the decision of another circuit court on the law of a state within the latter's circuit, and to follow controlling state law, effectively discriminates against a federal defendant on issues of state law, and contravenes prior decisions of this Court.

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Petitioner The Associated Press ("AP") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on October 27, 1982. A petition for rehearing was denied on December 15, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit of which review is sought is reported at 692 F.2d 266 and appears in the Appendix to this Petition (1-19a).[1] The decision

1 Citations herein to material printed in the Appendix appear as "_____ a". Citations herein to material contained in the Joint Appendix filed below appear as "_____JA."

of the Court of Appeals for the Second Circuit denying the petition for rehearing (unreported) also appears in the Appendix to this Petition (21a).

The opinion of the District Court for the Southern District of New York granting the motion of AP is not officially reported but appears at 8 Media Law Reporter 1952 and also in the Appendix to this Petition (23-37a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 27, 1982 (1-19a). A timely petition for rehearing with a suggestion for rehearing *en banc* was filed on November 10, 1982 and was denied on December 15, 1982 (21a). This petition for certiorari is filed within ninety (90) days thereof. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY AUTHORITY INVOLVED

The constitutional provision involved in this case is the First Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This provision is made applicable to the states by Section 1 of the Fourteenth Amendment, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Also involved is Pa. Cons. Stat. Ann. § 5942(a) (Purdon 1982) which provides:

> No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

STATEMENT OF THE CASE

Following statewide elections in Pennsylvania, petitioner AP prepared news dispatches in December 1978 reporting the names and other information identifying many of the contributors to the candidates for governor. The dispatches reported, among other things, that five contributors to Governor-elect Thornburgh's successful campaign were alleged by the Pennsylvania Crime Commission to have ties to organized crime. One of the five was respondent Charles J. Bufalino, Jr. ("Bufalino"), a Pennsylvania attorney long employed as the Borough Solicitor of the Borough of West Pittston, a small Pennsylvania community. Bufalino brought this diversity action in the Southern District of New York alleging that he was defamed by the following statements:

> Richard L. Thornburgh, who rose to fame by battling organized crime, accepted political contributions from several individuals with alleged mob ties, according to his campaign records. . . .

> Among the 14,000 contributors listed by Thornburgh were:
>
> . . . -Charles Bufalino, Jr., an attorney who is related to Russell Bufalino, described by the Crime Commission as a Mafia boss. He gave $120.[2]
>
> * * *
>
> Governor-elect Richard L. Thornburgh will return campaign contributions to three individuals who allegedly have ties to organized crime figures . . . 'we are looking into whether Bufalino has documentable links to organized crime but as of today we have been unable to determine that . . . .'
>
> Bufalino, an attorney, is related to Russell Bufalino, identified by state and federal investigative agencies as a Mafia boss now in prison.

(1-7, 110-11, 134JA).

The AP dispatches were prepared by reporter Paul Carpenter, who, in addition to other research, made several telephone inquiries to public officials, including law enforcement personnel in the Pennsylvania Crime Commission, about the five contributors. He spoke with three Crime Commission officials who reported to him on the known organized crime connections of each of the five contributors. Two of the officials told Carpenter that respondent Bufalino was related to Russell Bufalino, identified by the Crime Commission as a Mafia leader. The third Crime Commission official told Carpenter that Bufalino represented clients whom the Crime Commission believed to be connected with organized crime (94-96, 663, 707, 726-41, 750-58, 1179-81, 1200-11, 1219-22JA).[3]

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2 An earlier AP dispatch reported that respondent Bufalino had been "identified as having ties to organized crime by the Pennsylvania Crime Commission" (105, 1399JA).

3 These officials made these statements with the understanding that their identities would not be divulged (96, 1222a).

The information as to Bufalino's family and business ties provided by the Pennsylvania Crime Commission officials was contained in publicly-available government and other reports then on file in the records of the Pennsylvania Crime Commission. The Commission's records as to Bufalino's ties included the following:

> (1) United States Senate committee reports and charts which state that Russell Bufalino is the Mafia boss of Northeastern Pennsylvania, that respondent Bufalino is his cousin, and that Bufalino's father Charles Bufalino and his uncle William Bufalino are also cousins of Russell Bufalino;
>
> (2) United States Senate Committee reports which state that Bufalino's uncle William Bufalino and his grandfather Santo Volpe, Sr. are "criminal associates" of Russell Bufalino;
>
> (3) Pennsylvania Crime Commission's published 1970 Report on Organized Crime which states that Bufalino's grandfather Santo Volpe, Sr. was the first leader of the Mafia in Northeastern Pennsylvania, and that Bufalino's friend and client William Medico was a "criminal associate" of Russell Bufalino;
>
> (4) land filings and records of judicial proceedings which show that Bufalino represented members of the Medico family, including William, Philip and Angelo Medico, in a variety of legal transactions; and
>
> (5) land filings which show that Bufalino was the grantee in a land transaction in which Santo Volpe, Sr. was grantor.

(913-14, 1103-06, 211-16, 220-22, 234-41, 249, 300-02JA).

There is no dispute that the statements given by the Crime Commission officials to Carpenter accurately reported the information on Bufalino contained in the Commission's own files. It is equally undisputed that the AP news dispatches

accurately reported both the officials' statements and the information contained in the official files. Despite these facts, the court of appeals reversed the district court's grant of summary judgment to AP.

The summary judgment motion was based upon the claim that the dispatches were protected by both constitutional and state law privileges.[4] In support of its motion, AP submitted—in addition to the reports in the Crime Commission's files—voluminous official records, consisting of numerous government reports, court filings and proceedings, and published accounts, all of which were publicly available, and completely corroborated the statements in the news dispatches. These additional official records included:

> 1) an FBI document stating that Russell Bufalino's local relatives include "a cousin Charles Buffalino, Jr. [sic], a local Attorney" (941JA);
>
> 2) the testimony of Russell Bufalino in a deportation proceeding that respondent Bufalino's father was a cousin and that his uncle William "is a cousin and 'compare' of mine" (208-09JA);
>
> 3) a corresponding affidavit of Bufalino's uncle William stating that William was "related to" Russell Bufalino (202-03JA);
>
> 4) a later published report of the Pennsylvania Crime Commission stating that respondent Bufalino's grandfather Santo Volpe, Sr., his uncle Joseph Saraceno, and six of his friends and clients, including one Philip Medico, are "members" or "associates" of Russell Bufalino's "crime family" (298-03, 971-80, 1001JA);
>
> 5) FBI documents which state that Philip Medico is a "capodecina" of Russell Bufalino and that three

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4 It is not disputed that Pennsylvania law controls the state law aspects of this litigation.

of respondent's friends and clients, as well as his uncle Joseph Saraceno, are Philip Medico's "criminal associates" and/or "members" of the Russell Bufalino crime family (513-50JA); and

6) records of judicial proceedings, deeds and mortgages showing respondent Bufalino's representation of and dealings with Russell Bufalino, Santo Volpe, Sr., and a number of other organized crime figures (234-48, 257-97, 953-59, 1019-30, 1034-80, 1091-98JA).

Although Bufalino denied that there is an "identifiable" relationship to Russell Bufalino (1495-96JA), he did not deny that the official record showed that the relationship in fact exists. Moreover, on deposition Bufalino freely admitted that he knows, respects and is friendly to Russell Bufalino (1459-60JA), concededly a twice-convicted felon identified by the Government as a major leader of organized crime. *See, e.g., United States* v. *Russell Bufalino*, No. 80 Cr. 829 (S.D.N.Y. November 17, 1981), *aff'd*, 683 F.2d 639 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3508 (January 10, 1983). Bufalino conceded, in addition, that as the official record also shows, he has close family, social and/or professional ties to the various organized crime figures mentioned.[5]

In a Memorandum Decision dated January 25, 1981, the district court granted summary judgment in favor of AP, ruling as a matter of law that the AP dispatches were privileged under both constitutional and state law. The district court found that the AP news reports were protected by the First Amendment privilege recognized in *New York Times Co.* v. *Sullivan*, 376

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5 Bufalino testified to his close and continuous social and business/professional dealings with Philip Medico and five other figures in addition to his two uncles and his grandfather named above (1407-21, 1432-34, 1437, 1520JA). It is not disputed that every one of these men have been designated by law enforcement authorities as organized crime figures.

U.S. 254 (1964), because Bufalino was a public official, and that Bufalino had failed to demonstrate, by clear and convincing evidence, that AP published with actual malice, the requisite constitutional standard of liability (34-36a). Alternatively, it found that the statements were covered by the official reports privilege recognized by Pennsylvania law and recently construed by the United States Court of Appeals for the Third Circuit in *Medico* v. *Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981) (27-34a).

On October 27, 1982, the Court of Appeals for the Second Circuit reversed the district court's grant of summary judgment for AP. In a novel *sua sponte* ruling, on an issue that was neither briefed nor argued by the litigants, the court of appeals denied to AP the First Amendment protection extended in *New York Times Co.* v. *Sullivan, supra*, because the news dispatches omitted mention of Bufalino's official title as Borough Solicitor and because AP did not demonstrate Bufalino's renown as an official within the community (15-18a). The court of appeals did not question or reverse the district court finding that there was absolutely no evidence of actual malice.

The court of appeals also rejected the holding of the Supreme Court of Pennsylvania as construed by the Court of Appeals for the Third Circuit in *Medico* v. *Time, Inc.*, *supra*, and, in contravention of its own policy requiring deference to decisions of other circuit courts on matters of pertinent state law, denied to AP the protection of the Pennsylvania official reports privilege. The court ruled that, notwithstanding the contrary view of the Third Circuit which was based squarely on Pennsylvania precedent, the privilege in Pennsylvania did not extend to any official reports which the reporter himself had not examined when he wrote the dispatch, and could not be based on the oral reports of the Pennsylvania Crime Commission officials to whom the reporter spoke in the absence of disclosure of their identities (10-14a).

The present petition for a writ of certiorari follows the denial by the court of appeals of AP's petition for rehearing (21a).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS RAISES IMPORTANT FIRST AMENDMENT QUESTIONS REGARDING APPLICATION OF THE PUBLIC OFFICIAL DOCTRINE

This case raises two important, far-reaching questions in the application of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). The first is whether the standard articulated in that case extends to news reports about contributors to a candidate's campaign for public office, where the suit is brought by a contributor whose identification is integral to the reports. The second question is whether that standard applies to news reports concerning a local public official which omit the official's title but which nevertheless concern an issue bearing directly on his fitness for office.

The genius of *New York Times Co.* v. *Sullivan*, *supra*, was its elimination of strict and artificial rules in media defamation cases concerning public officials while assuring the protection of the reputations of public officials from deliberate falsehoods. It thereby broadly encouraged press criticism, inquiry and debate on official conduct and conduct of candidates for public office. Subsequent decisions of the Court made clear that *New York Times Co.* applied even to statements unrelated to official office so long as they bear on the official's fitness for office. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971).

The segments of the news reports here in issue focused on contributions, by persons with alleged organized crime ties, to a successful campaign for governor of one of the largest states in the nation. These are precisely the kinds of reports which *New York Times Co.* and its progeny were designed to protect. *See, e.g., Monitor Patriot Co.* v. *Roy, supra*, 401 U.S. at 272. Had the governor-elect sued on these reports there is little

doubt that the standard enunciated in *New York Times Co.* v. *Sullivan* would have been applied. Here, however, a suit on these reports was not brought by the candidate, but by one of the contributors whose alleged ties to both organized crime and the governor-elect precipitated the story. The value to the public of these news reports would be plainly diminished if only the candidate, but not his contributors, were identified. If the public is to be adequately informed, it is entitled to know all the facts relevant to an evaluation of the candidate's fund-raising efforts, not just a portion of those facts.

Unless the *New York Times Co.* v. *Sullivan* standard is applicable not only to suit by a governor-elect, but also to a suit by an individual whose conduct is integral to reporting on the official, the ability of the press to report on official conduct and candidate fitness for office may be gravely impaired, and the robust debate on public issues, which *New York Times Co.* v. *Sullivan* was intended to foster, inhibited. Surely, this Court should not countenance this result, which would cripple the press in the performance of its most fundamental duty.

The inhibiting implications of such a result are heightened, where, as here, the complaining contributor, Bufalino, is himself a public official holding the local office of Borough Solicitor in a small Pennsylvania community. The court of appeals refused to acknowledge Bufalino's status and hold him to the *New York Times Co.* standard. Instead, it articulated a novel restriction on the standard's application. It ruled that *New York Times Co.* did not extend to the reports in issue because the news dispatches omitted Bufalino's official title and because AP did not demonstrate Bufalino's renown as an official within the small borough which he had long served.

In particular, the court of appeals held that unless respondent's status as a public official is directly or impliedly identified in the story itself or "is otherwise immediately recognized in the community as that of a public official," *New York Times Co.* v. *Sullivan* is inapplicable (16a). This holding reflects an

overly simplistic view of the process by which the public acquires information about its public servants.

A name, although not immediately identified as that of a public official, may become so identified by virtue of subsequent developments or the dissemination of additional information. This is so particularly in small communities where local officials have intimate and regular contact with their constituents. Such identification could take place the same day as the original report or days, weeks or even months later. There is no reason to require inclusion of the office so that the identification occurs in the same dispatch containing the statements complained of, or to require that such identification be "immediate."

Moreover, many smaller communities are served by local newspapers, radio and cable television. Such local media regularly feature the activities of local officials and could, indeed, provide the very basis for association between the name and the public office which the court of appeals found to be fatally absent.

In this connection, part of the rationale for the *New York Times Co.* rule was that public officials "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity" to rebut the information which the public receives. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). This is nowhere more apparent than in small communities where local officials enjoy easy access to the local media and regularly use it as a forum for their views.

This Court has not squarely addressed the issue reached by the court of appeals, *see Ocala Star-Banner Co.* v. *Damron, supra,* 401 U.S. at 300 n.4, and the lower court decisions are in conflict. *Compare Foster* v. *Laredo Newspapers, Inc.*, 541 S.W.2d 809, 815-16 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977) *and Ocala Star-Banner Co.* v. *Damron,* 221 So. 2d 459 (Fla. App. 1969), *reversed on other grounds,* 401 U.S. 295 (1971) *with Goodrick* v. *Gannett Co.*, 500 F. Supp. 125 (D. Del. 1980) *and Stone* v. *Essex County Newspapers, Inc.*, 367

Mass. 849, 330 N.E.2d 161 (1975). It is an issue which the Court should now resolve.

* * *

The two questions relating to the application of *New York Times Co.* v. *Sullivan* raised by this case are important not only to petitioner here, who will be forced to undergo a lengthy, burdensome and expensive trial on the merits should this Court decline review. They are significant as well to the continued ability of the press to rely, with any degree of confidence and freedom from self-censorship, on the protection heretofore afforded vigorous reporting on public officials and candidates for public office. These issues warrant review.

II

THE RULING OF THE COURT OF APPEALS RESTRICTS CONSTITUTIONAL PROTECTION FOR ACCURATE ACCOUNTS OF OFFICIAL REPORTS

The court of appeals held that the official record offered by AP was an insufficient basis for the state-recognized official reports privilege, because the reports either were not before the AP reporter at the time he prepared the dispatch, or the information therefrom was transmitted by confidential sources. It ignored and thereby rejected AP's contention that the First Amendment precludes liability for defamation on AP's part for reporting accurately what is independently documented in official reports.

This ruling eviscerates the protection accorded by the First Amendment for accurately reporting the contents of official records, and raises an increasingly significant question for the press concerning the contours of this protection in the context of defamation claims.

This Court has underscored the value of this kind of reporting:

> Public records by their very nature are of interest to those concerned with the administration of govern-

> ment, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469, 495 (1975). Accordingly, this Court has extended First Amendment protection to the accurate reporting of the contents of official records, forbidding recovery against the press for civil damages in a privacy suit where the report in issue reflected judicial proceedings. *Cox Broadcasting Corp.* v. *Cohn, supra.* It has also held that the First Amendment forbids the imposition of criminal sanctions on the press for publishing the contents of official reports which have not been made public, as well as reports which have been obtained from unofficial sources. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978).

The underlying concerns on which these holdings are based apply with equal force to defamation claims. This Court has earlier observed that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 277. *See Green* v. *Alton Telegraph Printing Co.*, 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982). The inhibiting effect on the reporting of official reports and proceedings, occasioned by protracted litigation, the imposition of liability and possibility of devastating damage awards, poses serious dangers to a free press and concomitant access by the public to information essential to the proper exercise of its rights in a free society.

Here, the AP reports accurately summarize information about Bufalino's family ties to Russell Bufalino and his business and professional ties to organized crime which was contained in the Pennsylvania Crime Commission's files and

which was accurately conveyed to AP by Crime Commission officials. They accurately summarize, moreover, the contents of a host of official reports or files, all publicly available, of numerous federal bodies, including the Federal Bureau of Investigation, the Immigration and Naturalization Service, and the United States Senate, as well as various state and federal courts and county offices.[6]

To allow a finding of liability against a responsible news organization under these circumstances is simply to punish the press for accurately reporting official information compiled and disseminated by those charged with government administration and law enforcement, and to deprive the public of access to information that shapes its decisions about matters of legitimate public concern. A ruling of this import unquestionably merits review.

III

THE FAILURE OF THE COURT OF APPEALS TO DEFER TO THE DECISION OF ANOTHER CIRCUIT COURT ON A QUESTION OF THE LAW OF A STATE WITHIN THE LATTER CIRCUIT AND TO FOLLOW CONTROLLING STATE LAW DISCRIMINATES AGAINST A FEDERAL DEFENDANT ON STATE ISSUES AND CONFLICTS WITH DECISIONS OF THIS COURT

In refusing to extend to the AP statements in issue the protection accorded by Pennsylvania law to fair and accurate summaries of official reports, the court of appeals expressly rejected the direct holding of the Court of Appeals for the Third Circuit in *Medico* v. *Time, Inc.*, 643 F.2d 134, 146-47 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981)(39-65a). In *Medico*, a diversity defamation case, the Third Circuit held that Pennsyl-

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6 Moreover, Bufalino concedes the existence of this official record, and his failure to complain about its accuracy at any previous time (1562-66JA). He also concedes a web of social, family and business ties to reported Mafia figures wholly outside the scope of the official record.

vania law would protect a news story reporting the contents of unattributed nonpublic FBI documents, and rejected the contention that the Pennsylvania privilege would require the reporter to have actually relied on the official document in preparing the story.

Both the policy of the Second Circuit and controlling Pennsylvania authority required the court of appeals to follow the *Medico* decision.[7] In *Binder* v. *Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53 (1971), the Pennsylvania Supreme Court previously had extended the Pennsylvania official reports privilege to a report of a judicial proceeding prepared by a reporter who, relying on an intermediary for his information, did not have actual knowledge of the proceedings when he prepared the article. The Pennsylvania Supreme Court flatly ruled that ". . . how a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question." 275 A.2d at 58 (74a).[8]

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7 Only recently the Second Circuit ruled that as a matter of *stare decisis*, it was required to defer to a decision by another court of appeals with respect to the law of a state within the latter's circuit, absent a "clear basis" in state law indicating that the other circuit's conclusion was incorrect. *Factors Etc., Inc.* v. *Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1973 (1982). As discussed above, no such "clear basis" for rejecting the *Medico* ruling could be found in Pennsylvania law.

8 Pennsylvania would protect the statements on a separate ground. The court of appeals refused to extend the privilege to the reports of the Pennsylvania Crime Commission sources absent disclosure of the identities of those sources (12-14a). However, under the Pennsylvania Shield Law, 42 Cons. Stat. Ann. § 5942(a)(Purdon 1982), the courts of Pennsylvania have consistently upheld the grant of an absolute evidentiary privilege from source disclosure without sanction of any type. *See, e.g., In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963); *Pesavento* v. *Wilkes-Barre Independent, Co.*, 13 Pa. D.& C. 3d 216 (1979); *Hepps* v. *Philadelphia Newspapers, Inc.*, 3 Pa. D.& C. 3d 693 (1977); *Steaks Unlimited* v. *Deaner*, 623 F.2d 264 (3d Cir. 1980); *Altemose Construction Co.* v. *Building & Construction Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977).

The court of appeals' rejection of the Third Circuit's ruling conflicts with decisions of this Court which recognize the need for uniformity in federal decisions resolving dispositive issues of state law. Thus, this Court has recognized as fundamental that "[f]or purposes of diversity jurisdiction, a federal court is, 'in effect, only another court of the State.' " *Angel* v. *Bullington*, 330 U.S. 183, 187 (1947), *citing Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945). This Court additionally has approved deferring to federal circuit court judges who are experienced in the law of a state within their circuit, where that state's law is at issue. *See, e.g., United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280 (1942).

Failure of the federal courts to follow this policy introduces substantial confusion and uncertainty into federal litigation concerning state claims. Particularly where a plaintiff's choice of a federal forum has deprived a defendant of an opportunity to present a state issue to a state court, this departure discriminates against that federal defendant by depriving it of a defense on a state law matter which would have been available in state court. A court, state or federal, sitting in Pennsylvania on this case would have applied the law of Pennsylvania as found by the Pennsylvania Supreme Court or the Third Circuit. It would not have agreed with the Second Circuit.

The court of appeals' rejection of established precedent and policy fatally deprived AP of a dispositive state law defense. This Court's clear command that "a federal court adjudicating a State-created right solely because of diversity of citizenship of the parties . . . [not] substantially affect the enforcement of the right as given by the State," *Guaranty Trust Co.* v. *York*, *supra*, 326 U.S. at 108-09, should not be so lightly disregarded.

CONCLUSION

For all the foregoing reasons, we urge that a writ of certiorari be issued.

Dated: March 14, 1983

Respectfully submitted,

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APPENDIX

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Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 55—August Term, 1982

(Argued September 1, 1982 Decided October 27, 1982)

Docket No. 82-7256

CHARLES J. BUFALINO, JR.,

Plaintiff-Appellant,

—against—

THE ASSOCIATED PRESS,

Defendant-Appellee.

THOMAS A. ROTHWELL, ESQ., Washington D.C. (Randolph J. Seifert, Esq., New York, N.Y., of counsel), *for Plaintiff-Appellant.*

RICHARD N. WINFIELD, ESQ., New York, N.Y. (Rogers & Wells, N.Y., N.Y., Louise Sommers, Esq., of counsel), *for Defendant-Appellee.*

Before:

LUMBARD, CARDAMONE and WINTER,
Circuit Judges.

LUMBARD, *Circuit Judge*:

Charles J. Bufalino, Jr. appeals from a grant of summary judgment to the Associated Press (AP) in his diversity action for defamation against AP. Judge Werker of the Southern District of New York granted AP summary judgment on both of two independent grounds. First, he held that AP's published statements about Bufalino were not actionable under the "fair report privilege" recognized by Pennsylvania law. Second, after finding that Bufalino was a public official and that AP had not acted with malice, he held Bufalino's action barred under the constitutional "malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We reverse the grant of summary judgment on both grounds and remand for further proceedings.

Appellant is a member of the Pennsylvania bar who resides and practices law in West Pittston, Pennsylvania,

a community of some 7,000 to 8,000 persons in the Scranton-Wilkes-Barre area of northeastern Pennsylvania. In addition to his private practice, appellant is employed by the Borough of West Pittston in the part-time, appointive position of Borough Solicitor. As Borough Solicitor appellant attends meetings of the Borough Council (the legislative body for West Pittston) and, upon request, advises the Council on legal matters. He is compensated from the Borough budget at approximately $3,500 per year. Appellant claims that two reports prepared by AP (a New York corporation) and published in certain Pennsylvania newspapers in December 1978, defamed him with consequent damage to his personal and professional lives. These reports identified appellant as a person "with alleged mob ties."

Appellant commenced this action with the filing of a complaint on November 30, 1979. AP served its answer on December 24, 1979. Following discovery by both parties, AP moved for summary judgment on June 10, 1980. Judge Werker granted AP's motion in an opinion filed on January 28, 1982.

Judge Werker assumed certain facts to be true in rendering summary judgment for the defendant. While plaintiff disputes some of these facts, we also will assume them to be true for purposes of this appeal so that the correct legal standard may be established prior to trial. At trial plaintiff will be free to put his version of the facts to the trier. We therefore state the facts as follows.

On December 7, 1978 Pennsylvania Governor-elect Richard L. Thornburgh released a list of contributors to his election campaign. Paul Carpenter, then a newsman in the Harrisburg office of AP, reviewed the list that day. Carpenter recognized the name "Bufalino" as a result of

previous reporting work in the areas of law enforcement and organized crime. He researched the backgrounds of the individuals whose names he recognized to confirm information about them and to obtain additional information for a news report. He consulted materials released by the Pennsylvania Crime Commission (a public investigatory body without enforcement powers), including its 1970 Report on Organized Crime. He consulted AP files and his own working files. He reviewed newspaper articles which reported that William E. Bufalino, Sr., a Detroit lawyer, was a cousin and criminal associate of Russell Bufalino, a reputed Mafia leader.[1] He next contacted two other reporters believed by him to be reliable and knowledgeable in the area of organized crime. One reporter told him that appellant and Russell Bufalino were related, and the other told him that he was "pretty sure" they were related.

Carpenter also telephoned personnel at the Pennsylvania Crime Commission to verify his information. Two Commission employees, described by Carpenter as "officials," informed Carpenter that appellant was related to Russell Bufalino. The Commission had previously identified Russell Bufalino as a Mafia leader. A third Commission employee (or "official") told Carpenter that in his private practice appellant represented individuals suspected of having connections with organized crime. Carpenter agreed with the "officials" not to reveal their identity, and he has not done so. At a pre-trial deposition

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1 Russell Bufalino and this court have not been strangers to each other. *See United States v. Bufalino*, 683 F.2d 639 (2d Cir. 1982); *United States v. Bufalino*, 576 F.2d 446 (2d Cir.), *cert. denied*, 439 U.S. 928, 99 S.Ct. 314, 58 L.Ed.2d 321 (1978); and *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

Carpenter stated that the word "officials," as he used it, could refer not only to members of the Commission, but also to various officers and agents of the Commission.

After obtaining this information, Carpenter prepared a story on the campaign fund disclosures for transmission to morning newspapers in Pennsylvania. Robert Dvorchak, in charge of AP's Harrisburg bureau, reviewed the story and asked Carpenter about the sources of his information for each individual named in the story. The story was then transmitted to AP's Philadelphia Bureau on the evening of December 7, 1978.

As reported in the *Scranton Times* on December 8, 1978, and in the *Wilkes-Barre Times-Leader Evening News* on December 9, 1978, the story stated:

> Harrisburg (AP)—Governor-elect Richard L. Thornburgh, who rose to fame by battling organized crime, accepted political contributions from several individuals with alleged mob ties, according to his campaign records . . .
>
> Among the 14,000 contributors listed by Thornburgh were:
>
> . . . . Charles Bufalino Jr., an attorney who is related to Russell Bufalino, described by the Crime Commission as a Mafia boss. He gave $120.

On December 8, 1978, Dvorchak prepared a follow-up story incorporating the response of Governor-elect Thornburgh's press secretary to the original article. This follow-up story was transmitted by AP's Harrisburg bureau to other AP members on December 8th and 9th. As reported in the *Scranton Times* on December 9, 1978, and in the *Wilkes-Barre Times-Leader Evening News* on December 13, 1978, this story stated:

> Harrisburg (AP)—Governor-elect Richard L. Thornburgh will return campaign contributions to three individuals who allegedly have ties to organized crime figures. . . .
>
> . . . .
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> "We are looking into whether Bufalino has documentable links to organized crime, but as of today we have been unable to determine that," . . . .
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> . . . .
>
> Bufalino, an attorney, is related to Russell Bufalino, identified by state and federal investigative agencies as a Mafia boss now in prison.
>
> . . . .
>
> But [Thornburgh's press secretary] said Bufalino's mere family ties . . . do not warrant returning . . . Bufalino's $120 contribution.

Appellant bases his action for defamation upon the two stories quoted above. To establish liability for defamation under Pennsylvania law, the plaintiff must prove both the defamatory character of the defendant's communication and the recipient's understanding of its defamatory meaning. 42 Pa. Cons. Stat. Ann. § 8343(a) (Supp. 1981). The Pennsylvania Supreme Court has stated that the court is to determine, in the first instance, whether the communication complained of is capable of a defamatory meaning. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (1971). If the court concludes that the communication may have a defamatory meaning, the jury is to determine whether it was so understood by the recipient. Our initial inquiry, therefore, is whether AP's statements about appellant are susceptible of a defama-

tory meaning. The Pennsylvania Supreme Court has adopted the definition of defamation set forth in § 559 of the original Restatement of Torts. *Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 167 A.2d 472 (1969).[2] We therefore must evaluate AP's statements in light of § 559, which defines a defamatory communication as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." We have no doubt that under this test AP's statements about appellant are susceptible of a defamatory meaning. A description of an individual as a person "with alleged mob ties" may well lower the community's estimation of that person and deter others "from associating or dealing with him." It is true that AP's statement of a family relationship between appellant and Russell Bufalino may not in itself be defamatory. A mere imputation of family relationship generally is not actionable. However, Governor-elect Thornburgh's prompt decision to return the campaign contributions of certain persons named in the articles is strong evidence of the meaning most readers would attribute to the phrase "alleged mob ties." We conclude that taken together AP's stories *could* have a defamatory meaning, and that appellant therefore satisfied his initial burden of proof.

Defamatory communications are not actionable, however, if protected by privilege. Among the privileges recognized by Pennsylvania is a privilege for the "fair and accurate" reporting of official records and proceedings. The scope of this privilege in Pennsylvania is open to debate. Although in several decisions the Pennsylvania

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2 Section 559 of the Restatement (Second) of Torts makes no amendments to § 559 of the original Restatement.

Supreme Court adopted as the law of the state the fair report privilege set forth in § 611 of the original Restatement of Torts, *see Binder v. Triangle Publications, Inc.*, 442 Pa. 319, 324, 275 A.2d 53, 56 (1971); *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 177, 191 A.2d 662, 667 (1963); *Sciandra v. Lynett*, 409 Pa. 595, 600, 187 A.2d 586, 589 (1963), no Pennsylvania court has yet considered the significance of the amendments made to § 611 in the Restatement (Second) of Torts. We agree, however, with Judge Werker that the fair report privilege contained in § 611 of the Second Restatement embodies present Pennsylvania law. We note first the expressed willingness of the Pennsylvania Supreme Court to adopt sections of the Second Restatement where the Restatement differs from or supplements Pennsylvania common law. *Gilbert v. Korvette, Inc.*, 457 Pa. 602, 611 n.25, 327 A.2d 94, 100 n.25 (1974). Second, we note that significant federal authority treats § 611 of the Second Restatement as the law of Pennsylvania. *See Medico v. Time, Inc.*, 643 F.2d 134, 138 (3d Cir.), *cert. denied*, 454 U.S. 836, 102 S.Ct. 139, 70 L.Ed.2d 116 (1981); *Hanish v. Westinghouse Broadcasting Co.*, 487 F. Supp. 397 (E.D. Pa. 1980); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 415 (E.D. Pa. 1978). We therefore believe that Pennsylvania law is accurately stated in § 611 of the Second Restatement, which provides:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

AP claims that its stories are protected by this privilege. Judge Werker agreed, and granted AP summary judgment under § 611. The judge granted summary judgment because he concluded that AP's statements about appellant constituted "fair and accurate" reports of information contained in official records. We reverse the grant of summary judgment because the record does not show that AP actually relied upon the official records which it now claims it accurately summarized in its stories.

In relevant part, Judge Werker read appellant's complaint to complain of two statements in the stories: 1) that appellant is related to Russell Bufalino; and 2) that appellant allegedly has ties to organized crime.[3] In Judge Werker's view both of these statements are privileged because each is supported by official records.

AP's first statement, said Judge Werker, was adequately supported by (a) an FBI memorandum of July 20, 1956 that identified appellant as a cousin of Russell Bufalino; (b) the statement by Crime Commission "officials" to Carpenter that appellant is related to Russell Bufalino; and (c) by several other documents, including a U.S. Senate Report and testimony in deportation proceedings which establish a family relationship between appellant's father (Charles J. Bufalino, Sr.) and uncle (William Bufalino) and Russell Bufalino, and hence inferentially between appellant and Russell Bufalino. AP makes no claim that it relied on any of these sources other than source (b) at the time it circulated its stories in December, 1978.

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3 Judge Werker also read appellant's complaint to complain of the statement that Russell Bufalino has been identified by state and federal officials as a Mafia boss. We need not decide the application of the fair report privilege to this statement because it is obvious that a statement identifying Russell Bufalino as a mobster does not defame appellant.

Judge Werker found that AP's second statement was adequately supported by the documents establishing a family relationship between Russell Bufalino and appellant, and by the statement of the Crime Commission "official" to Carpenter that appellant represented underworld figures in his law practice. Judge Werker ruled that the statement that appellant had "alleged mob ties" was a fair and accurate summary of all of this official information. AP additionally cites to this Court a number of other official records which, it argues, further establish financial, family, and social ties between appellant and persons identified by state and federal officials as participants in organized crime. Not relied upon by Judge Werker, these "records" include depositions in the present trial, land filings, and records of other judicial proceedings. They suggest that appellant knows and considers himself friendly to a number of suspected mobsters, and that, as an attorney, he has represented their interests in both civil and criminal proceedings. Even were we to accept the accuracy of these additional records, it is apparent that AP did not rely upon them in preparing its reports, but instead discovered them in preparation for the present litigation.

We believe that the lack of reliance is dispositive of the issue of privilege. Judge Werker held that actual reliance upon official records or documents is not a pre-requisite to application of the fair report privilege. Instead, he ruled, an accurate summary of official reports is privileged even if the reports were not relied upon and the accuracy of the summary is mere coincidence. As authority for this ruling the Judge cited *Medico v. Time, Inc.*, 643 F.2d 134, 146-47 (3d Cir.), *cert. denied*, 454 U.S. 836, 102 S.Ct. 139, 70 L.Ed.2d 116 (1981). In *Medico*, the plaintiff argued that the defendant could claim the § 611

privilege only if, in preparing its report, it had actually relied upon the official document in question. The Third Circuit, citing *Binder v. Triangle Publications*, 442 Pa. 319, 275 A.2d 53 (1971), held for the defendant and stated that Pennsylvania law "squarely contradicts" the argument that actual reliance is necessary.

We believe that *Medico* reads *Binder* for much more than it's worth. In *Binder*, the Pennsylvania Supreme Court held the privilege available where the defendant's reporter, who did not attend a judicial proceeding, based his report of the proceeding on statements given him by a third party who did attend. Said the Pennsylvania Court: "[H]ow a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question." 442 Pa. at 327, 275 A.2d at 58. Taken in context, we believe this statement means only that the privilege is available where a reporter who purports to report on an official proceeding does not have personal knowledge of the proceeding but instead relies on an intermediary who does. That is, in *Binder* the reporter ultimately relied on information obtained at the official proceeding, he believed he was relying on official information, and he wrote a report purporting to summarize the proceeding. In contrast, if *Medico* is correct in holding that reliance is not required, a reporter's unsubstantiated defamatory statements, made independent of any report of public proceedings, would be privileged if after-the-fact the reporter could find some official record embodying his statements. We do not believe that the privilege should be applied to the latter situation. The privilege is intended to facilitate media reporting of official proceedings so that the public may be informed. *See* Comment *a* to § 611 ("The basis of this privilege is the

interest of the public in having information made available to it as to what occurs in official proceedings and public meetings.") By immunizing from defamation liability accurate reports of newsworthy events, the privilege helps to ensure media dissemination of official records containing potentially defamatory material. In so doing, the privilege serves an important public policy. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495, 95 S.Ct. 1029, 1046, 43 L.Ed.2d 328 (1975) ("Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.") However, the privilege cannot be divorced from its underlying policy of encouraging the broad dissemination of public records. The rule applied by the District Court does not serve that policy because it does nothing to encourage the initial *reporting* of public records and proceedings. Certainly § 611 should not be interpreted to protect unattributed, defamatory statements supported after-the-fact through a frantic search of official records. For where the media does not directly or indirectly rely upon official records, the policy underlying the privilege is inapplicable and the privilege itself should not be applied.[4] We thus conclude that AP is not entitled to summary judgment on the basis of records upon which it did not actually rely.

AP claims that it did actually rely upon certain official statements, namely the statements made to Carpenter by the Crime Commission "officials." In the present state of the record, however, AP cannot rely upon those state-

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[4] Moreover, even where the reporter has actually relied on official records, the privilege can be lost through failure to make proper attribution. *See Hughes v. Washington Daily News Co.*, 90 U.S. App. D.C. 155, 193 F.2d 922 (1952).

ments as a basis for application of the § 611 privilege. Carpenter has honored his agreement not to identify the persons with whom he spoke, whom he describes as "officials." We have absolutely no quarrel with AP's contention that under Pennsylvania law AP cannot be compelled to reveal the identities of Carpenter's interlocutors. Pennsylvania's "Shield Law," 42 Pa. Cons. Stat. Ann. § 5942(a) (1982) protects reporters from compelled disclosure of their sources in any legal proceeding or trial. This statute has been broadly construed by the Pennsylvania courts, *see In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963), and is clearly operative in the present case. *See Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523, 527 (E.D.N.Y. 1979) (Shield Law is not restricted to cases in which newspaper or reporter is not a party.) However, it is one thing to say that AP cannot be compelled to reveal Carpenter's sources and quite another to say that AP can simultaneously base its claim to the § 611 privilege upon the statements of those sources. Obviously the latter cannot be true. Only reports of *official* statements or records made or released by a public agency are protected by the § 611 privilege. Statements made by lower-level employees that do not reflect official agency action cannot support the privilege. *See, e.g., Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89 (D.C. App. 1980), *cert. denied*, 451 U.S. 989, 101 S.Ct. 2327, 68 L.Ed.2d 848 (1981). Without knowledge of the identities of the persons to whom Carpenter spoke, it is impossible to say whether their statements constituted official action within the scope of the privilege. We see nothing in Pennsylvania law which requires us to give AP the benefit of the doubt on the issue of the identities of Carpenter's sources. Nor do we believe that our holding will defeat the purpose of the Shield Law to ensure a free

flow of information to the media by protecting reporters from compelled disclosure. AP still may withhold the identities of Carpenter's sources and still may rely upon their alleged statements in its defense. In fact, our ruling does nothing more than recognize that a proponent cannot rely upon a privilege if he fails to prove all of its necessary elements.

We therefore reverse the grant of summary judgment to AP on the basis of the § 611 privilege.

Judge Werker also based his grant of summary judgment to AP on the constitutional "malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Under *New York Times*, a "public official" may not recover for a defamatory statement related to his official conduct unless he proves that the defendant made his statement with " 'actual malice'—that is, with knowledge that (the statement) was false or with reckless disregard of whether it was false or not." 376 U.S. at 280, 84 S.Ct. at 726. Judge Werker concluded as a matter of law that as Borough Solicitor of the Borough of West Pittston appellant was a "public official." He further concluded that appellant had failed to raise a material issue of fact suggesting that AP had acted with malice.

Appellant does not challenge Judge Werker's finding that AP did not act with malice. Instead, relying upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), he argues that he does not occupy a position of sufficient responsibility in government to be classified as a public official. He also argues that the public official doctrine is inapplicable because AP's statements did not directly involve the performance of his duties as Borough Solicitor. AP counters that appellant indeed is a public official under the Supreme Court's

definition of that term in *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). In *Rosenblatt*, the Supreme Court stated that the term "public official" extends "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." 383 U.S. at 85, 86 S.Ct. at 675. AP further argues that a town attorney's alleged mob ties "touch on" his fitness for office and hence are covered by the public official doctrine. *See Garrison v. Louisiana*, 379 U.S. 64, 77, 85 S.Ct. 209, 217, 13 L.Ed.2d 125 (1964). Because we believe that both parties' arguments fail to address a crucial issue in this case, we find it unnecessary to decide whether a part-time appointed small-town attorney is a public official,[5] or whether AP's statement in fact implicated appellant's fitness for office. Instead, we hold that, upon the present record, AP is presumptively precluded from relying upon the *New York Times* malice standard because its stories

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5 Some cases have held that city, village, and municipal attorneys, even those retained part-time or only in connection with specific matters, are public officials. *See, e.g., Finkel v. Sun Tattler Co.*, 348 So.2d 51 (Fla. App. 1977), *cert. denied*, 358 So.2d 135 (Fla. 1978); *Frink v. McEldowney*, 29 N.Y.2d 720, 325 N.Y.S.2d 755, 275 N.E.2d 337 (1971); *Ewald v. Roelofs*, 120 Ill.App.2d 30, 256 N.E.2d 89 (1970). However, we have serious doubts that the First Amendment rights of the press require application of the public official doctrine to persons holding positions such as that of Borough Solicitor of the Borough of West Pittston. Obviously not every government employee is a public official under *Rosenblatt*. Is the public interest in the qualifications of a part-time, appointed town counsel really so great that the counselor must suffer defamation with little prospect of redress? The public certainly has an interest in the qualifications of such minor town officials, yet it also has an interest in the continued willingness of such persons to devote their time and efforts to civic affairs. As the author of one treatise has perceptively noted, *see* L. Eldredge, *The Law of Defamation* § 51 at 271-72, extension of the public official doctrine beyond its intended scope could well result in the loss to the community of the services of its most talented citizens.

did not identify appellant as the holder of a public office.

Neither of AP's stories identified appellant as the Borough Solicitor of West Pittston or as the holder of any public office. The stories described appellant merely as "an attorney." A reader without prior knowledge of appellant's status as Borough Solicitor would most likely, and correctly, assume from the description that appellant is engaged in the private practice of law. The description would not directly or impliedly inform the reader that appellant holds any public office. We conclude that the public official doctrine is not available where the defendant's statements do not directly or impliedly identify the plaintiff as a public official, and there is no showing that the plaintiff's name is otherwise immediately recognized in the community as that of a public official.

In *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), the Supreme Court identified the important interests which underlie the public official doctrine adopted in *New York Times*. "There is, first," said the Court, "a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." 383 U.S. at 85, 86 S.Ct. at 675. These interests are not served by defamatory statements which do not identify their subject as a public official. Such statements cannot foster debate on public issues or officials for the simple reason that those who read or hear the statements are never informed of the statements' relation to matters of public concern. At the same time, the statements may significantly and adversely affect the defamed individual's personal and professional lives. Under these circumstances, we believe that the second important policy identified by the *Rosenblatt* court, namely, society's "pervasive and strong interest in

preventing and redressing attacks upon reputation," 383 U.S. at 86, 86 S.Ct. at 676, must prevail over the defendant's right to require proof of malice. We therefore hold that appellant is in the position of a private individual and under Pennsylvania law, *see infra*, may recover for defamatory statements upon proof of mere negligence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Of course, in some cases an individual's status as a public official may be so widely known throughout the community that a direct or indirect identification of the individual as a public official will be unnecessary to application of the doctrine. A defamatory statement which identifies the President of the United States, or a state governor, by name only, would still fall under the doctrine because the status of such persons as public officials is common knowledge. Similarly, the doctrine would apply to statements about an official of far lesser stature if the statements are broadcast in the area within the official's jurisdiction and a significant portion of the population in that area would recognize the official's public status from his name alone. It suffices that in the present case AP has made no showing of the degree to which West Pittston residents recognize appellant, by name, as the holder of a public office. We therefore hold that as the record presently stands the public official doctrine does not apply to this case.

The Supreme Court has not yet ruled upon the significance of a news report's failure to identify a public officeholder as such. *See Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 n.4, 91 S.Ct. 628, 632 n.4, 28 L.Ed.2d 57 (1971). Other courts, however, have reached the same conclusion we reach here. *See Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 815-16 (Texas 1976),

cert. denied, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977); *Ocala Star-Banner Co. v. Damron*, 221 So.2d 459 (Fla. App. 1969), *appeal dismissed*, 231 So.2d 822 (Fla. 1970), *rev'd on other grounds*, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971). To the extent other decisions have taken a contrary position, *see Goodrick v. Gannett Co.*, 500 F. Supp. 125 (D. Del. 1980); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161, 171 (1975), we disagree.

Finally, AP asks us to hold that Pennsylvania law requires appellant to prove malice. AP relies upon *Matus v. Triangle Publications, Inc.*, 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930, 92 S.Ct. 2494, 33 L.Ed.2d 343 (1972), in which the Pennsylvania Supreme Court held that liability may be imposed for defamatory falsehoods related to matters of public interest only upon proof of actual malice. *Matus*, however, was decided in the interval between *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), in which a plurality of the Supreme Court held that private figure plaintiffs must prove actual malice if the defamatory communication involves a matter of public concern, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), in which the Supreme Court held that states may permit private figure plaintiffs to recover merely upon proof of "actual fault." The question before us is whether Pennsylvania continues to adhere to the rule adopted in *Matus* in light of *Gertz*. The Pennsylvania Supreme Court has not considered this question and the issue, therefore, remains unsettled. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 272 (3d Cir. 1980); *Lorentz v. Westinghouse Electric Corp.*, 472 F. Supp. 946, 953 n.6 (W.D. Pa. 1979). We believe, however, that if confronted by the question the Pennsylvania Su-

preme Court would reject *Matus* and permit private figure plaintiffs to recover upon proof of negligence. We note that the large majority of state courts which have decided private figure cases following *Gertz* have adopted a negligence standard. *See Denny v. Mertz*, 106 Wis.2d 636, 651 n.20, 318 N.W.2d 141, 148 n.20 (1982) and cases cited therein. More particularly, we are persuaded by the reasoning of Judge Luongo in *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 410-12 (E.D. Pa. 1978), that *Matus* no longer represents the law of Pennsylvania. *Accord, Marcone v. Penthouse Intl., Ltd.*, 533 F. Supp. 353, 360-61 (E.D. Pa. 1982); *Medico v. Time, Inc.*, 509 F. Supp. 268, 277 n.7 (E.D. Pa. 1980), *affd.*, 643 F.2d 134 (3d Cir. 1981), *cert. denied*, 454 U.S. 836, 102 S.Ct. 139, 70 L.Ed.2d 116 (1981). We therefore hold that Pennsylvania law does not require appellant to prove "actual malice."

Reversed and remanded.

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Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 82-7256

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteen day of December, one thousand nine hundred and eighty-two.

CHARLES J. BUFALINO, JR.,

Plaintiff-Appellant,

—v.—

THE ASSOCIATED PRESS,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, The Associated Press,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
/s/ FRANCIS X. GINDHART
by Francis X. Gindhart,
Chief Deputy Clerk

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Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 Civ. 6476 (HFW)

January 25, 1981

CHARLES J. BUFALINO,

Plaintiff,

—against—

THE ASSOCIATED PRESS,

Defendant.

APPEARANCES:

THOMAS A. ROTHWELL
2000 P Street, N.W.
Washington, D.C. 20036
Attorney for Plaintiff

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
By: Richard N. Winfield
Louise Sommers
Of Counsel
Attorneys for Defendant

MEMORANDUM DECISION

HENRY F. WERKER, D.J.

Plaintiff, Charles J. Bufalino, Jr., commenced this libel action against defendant, The Associated Press ("AP"), alleging that he was defamed by two news dispatches prepared and

transmitted by AP in December, 1978. The matter is presently before the court on defendant's motion for summary judgment. For the reasons that follow, summary judgment is granted for defendant.

In determining whether to grant a motion for summary judgment, "the court cannot try issues of fact; it can only determine whether there are issues to be tried." *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967). The affidavits and exhibits submitted by the parties "must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *see Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 444-45 (2d Cir. 1980). The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *Id.*; *Heyman* v. *Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975).

Viewed in the light most favorable to the plaintiff, the following facts appear. On December 7, 1978, the lists of campaign contributors to the gubernatorial campaigns of Richard L. Thornburgh and Peter Flaherty were filed in the Pennsylvania state capitol in Harrisburg. Paul Carpenter, then a newsman in the Harrisburg office of AP, reviewed the lists that day. He recognized several names, including that of plaintiff, as a result of his journalistic involvement in the areas of law enforcement and organized crime activities in Pennsylvania. He began to research the background of the individuals whose names he recognized to confirm information about them and to obtain additional information for a campaign fund disclosure story. Plaintiff consulted materials from the Pennsylvania Crime Commission, including its 1970 Report on Organized Crime, AP files and his own working files. Newspaper articles reviewed by Carpenter reported that William E. Bufalino, Sr., a Detroit lawyer, was a cousin and criminal associate of Russell Bufalino, a reputed Mafia leader. In a further effort to verify his information, Carpenter contacted two other reporters known to him to be reliable and knowl-

edgeable in the area of organized crime. One reporter told him that Charles J. Bufalino, Jr. and Russell Bufalino were related and the other told him that he was "pretty sure" that they were related.

Carpenter also telephoned law enforcement personnel in the Pennsylvania Crime Commission, whom he knew to be knowledgeable and reliable in an attempt to verify his information about Bufalino. Carpenter was informed by two Pennsylvania Crime Commission officials that Charles J. Bufalino was related to Russell Bufalino who was identified by the Crime Commission as a Mafia leader. He was also told by a Crime Commission official that Bufalino, an attorney, represented individuals who the Crime Commission believed to be connected with organized crime. The officials asked that Carpenter not reveal their identities and Carpenter so agreed.

Following receipt of this information, Carpenter prepared a story on the campaign fund disclosures for transmission to morning newspapers in Pennsylvania. The story was reviewed by Robert Dvorchak, the correspondent of the Harrisburg AP Bureau, and transmitted to the AP Bureau in Philadelphia on the evening of December 7, 1978.[1]

The story reported by the *Scranton Times* on December 8, 1978, and by the *Wilkes-Barre Times-Leader Evening News* on December 9, 1978 stated:

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1 The release provided in pertinent part:

> Governor-elect Richard L. Thornburgh and his defeated Democratic opponent Peter F. Flaherty filed official campaign disclosures Thursday, saying they spent a total of $2.7 million in their campaigns. . . .
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> . . .
>
> [D]onations of $120 each were listed from Fred Correale, Philip Medico, and Charles Bufalino. The three were involved in the Northwestern Pennsylvania Cable TV Co. and have been identified as having ties to organized crime by the Pennsylvania Crime Commission.

Exhibit 2 to affid. of Richard N. Winfield, sworn to June 9, 1980. Plaintiff did not sue for damages arising from publication of this release, however, and it is not even mentioned in the complaint.

> BACKERS' LIST SURPRISES THORNBURGH-
>
> Harrisburg (AP)—Governor-elect Richard L. Thornburgh, who rose to fame by battling organized crime, accepted political contributions from several individuals with alleged mob ties, according to his campaign records . . . .
>
> Among the 14,000 contributors listed by Thornburgh were:
>
> . . . Charles Bufalino, Jr., an attorney who is related to Russell Bufalino, described by the Crime Commission as a Mafia boss. He gave $120 . . . .

Complaint at ¶ 7.

On the evening of December 7, 1981, Carpenter prepared a rewrite of the campaign fund disclosure story. This story was reported by the *Scranton Times* on December 9, 1978 and the *Wilkes-Barre Times-Leader Evening News* on December 13, 1978. It stated:

> THORNBURGH PLANS FUND RETURN TO 3
>
> Harrisburg (AP)—Governor-elect Richard L. Thornburgh will return campaign contributions to three individuals who allegedly have ties to organized crime figures . . . . "we are looking into whether Bufalino has documentable links to organized crime but as of today we have been unable to determine that . . . ."
>
> Buffalino, an attorney, is related to Russell Bufalino, indentified by state and federal investigative agencies as a Mafia boss now in prison . . . .

Complaint at ¶ 8.

Plaintiff contends that both reports were false and defamatory and that his personal and professional lives have been damaged as a result. Under Pennsylvania law, two principal issues must be addressed in analyzing a claim of libel. They are whether the plaintiff has a cause of action for defamation,[2]

2 Under Pennsylvania law, a cause of action for defamation consists of two elements. The first is that the communication must be defamatory in nature and understood as such by the recipient. The second is

and if so, whether countervailing considerations concerning the first amendment nevertheless bar recovery. *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 270 (3d Cir. 1980).

AP's principal contention on this motion for summary judgment is that it may not be held liable under the common law privilege accorded the press to report on official proceedings, the fair report privilege. Under the formulation of the fair report privilege set forth in the *Restatement (Second) of Torts:*

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

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that the communication must be uttered maliciously. . . ." *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 270 (3d Cir. 1980).

A defamatory communication under the law of Pennsylvania is:

> a communication that 'tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' In Pennsylvania, 'it is the function of the court, in the first instance, to determine whether the communication complained of is capable of a defamatory meaning. . . . If the court . . . [so finds], it is for the jury to determine whether it was so understood by the recipient. . . .'

Id. at 270.

The statement that an individual has alleged mob ties, and is related to a reputed Mafia boss, if believed by those reading the statement, could well diminish an individual's reputation in the community and injure him socially and professionally. Under the circumstances, I find that the statements made in the AP reports were capable of a defamatory meaning. It is for the trier of fact to determine whether the statements in question were understood to be defamatory by the recipients.

Under Pennsylvania law, a communication is malicious if uttered "intentionally or negligently and 'without just cause or excuse.' " This component of a defamation action is " 'implied or presumed to exist from the unprivileged publication of defamatory words actionable per se.' This presumption can be negated, however, by the defense that the published material furthered 'some interest of social importance which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.' " *Id.* at 271.

Restatement (Second) of Torts § 611 (1977).

As recently observed by the Third Circuit in accepting the *Restatement* version of the privilege as the law of Pennsylvania:

> . . . [T]he law has long recognized a privilege for the press to publish accounts of official proceedings or reports even when these contain defamatory statements. So long as the account presents a fair and accurate summary of the proceedings, the law abandons the assumption that the reporter adopts the defamatory remarks as his own. The privilege thus permits a newspaper or other press defendant to relieve itself of liability without establishing the truth of the substance of the statement reported. [T]he fair report privilege . . . can be defeated in most jurisdictions by a showing that the publisher acted for the sole purpose of harming the person defamed.

Medico v. *Time, Inc.*, 643 F.2d 134, 137-38 (3d Cir.), *cert denied*, 70 L. Ed. 2d 116 (1981).

In *Medico*, the court held that Time's allegedly defamatory publication concerning Philip Medico was protected by the fair report privilege since the statements essentially were summaries of FBI criminal investigatory files.[3] The *Medico* court rejected plaintiff's contention that Time could "avail itself of the fair report privilege only if it actually based its article on the FBI materials" and that "if the report reflects the contents of the official materials merely by coincidence, the privilege does not attach." The court observed that Pennsylvania law "squarley contradicted" this argument, and ruled that the manner in which a press defendant obtained its knowledge of the information contained in official documents is irrelevant under the

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3 The documents relied on in *Medico* v. *Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 70 L. Ed. 2d 116 (1981), were an FBI report on "La Cosa Nostra, Philadelphia Division" and a personal profile report on Philip Medico. The FBI report was not generally available to the public and expressed only tentative and preliminary conclusions never adopted as accurate by the FBI.

law of Pennsylvania, provided the story is a fair and accurate account of the information contained in those documents.

Thus, in assessing AP's fair report defense it must be determined if questions of fact exist with respect to whether the AP reports were fair and accurate accounts of information contained in official reports at the time the stories were published and if so, whether AP acted for the sole purpose of harming plaintiff so as to defeat application of the privilege. In undertaking this task, the content of the reports must be scrutinized in order to determine whether the information contained in the stories was attributable to them. Consideration of the manner in which AP obtained knowledge of the information contained in the documents is unnecessary, however, so long as the stories were fair and accurate accounts of the information contained in official documents.

The statements complained of by plaintiff are (1) that he is related to Russell Bufalino, (2) that Russell Bufalino has been identified by state and federal officials as a Mafia boss, and (3) that he, Charles Bufalino, Jr., is an individual with alleged ties to organized crime.

There is no question that the statement that Charles J. Buffalino, Jr. is related to Russell Bufalino is a fair and accurate report of information contained in official state and federal documents. First, a Federal Bureau of Investigation memorandum captioned "Russell Buffalino [sic] . . . Top Hoodlum Coverage, Philadelphia Division" dated July 20, 1956 and bearing place of origination, Philadelphia, Pennsylvania states that "Subject's [Russell Bufalino's] local relatives are . . . a cousin, Charles J. Buffalino, Jr., [sic] a local attorney. . . ." Exhibits 81 and 82 to Supplemental Affidavit of Richard N. Winfield. Second, the Pennsylvania Crime Commission informally but officially reported to Carpenter that plaintiff was related to Russell Bufalino.[4] *See Mathis* v.

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4 Plaintiff contends that the affidavit of Paul Carpenter which states that two unidentified officials from the Pennsylvania Crime Commission reported to him that Charles J. Bufalino Jr. was related to Russell Bufalino is inadmissible on this motion for summary judgment.

(footnote continued)

Philadelphia Newspapers, Inc., 455 F. Supp. 406 (E.D. Pa. 1978); *Restatement (Second) of Torts* § 611, Comments d & e (1977). Third, several other official reports[5] which contain

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Fed. R. Civ. P. 56(e) provides that "[s]upporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence . . . ." The issue here, therefore, is whether Carpenter's statements that two unidentified officials of the Crime Commission reported to him that Charles J. Bufalino, Jr. was related to Russell Bufalino would be admissible at trial. In analyzing this question, Pennsylvania's shield law must be considered. The statute provides:

> No person engaged in, connected with, or employed by any newspaper of general circulation or any press association . . . , for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such persons, in any legal proceeding, trial or investigation before any government unit.

42 Pa. Cons. Stat. Ann. § 5942(a) (Supp. 1979).

As recently discussed by the Third Circuit:

> The shield statute . . . [represents] 'a wise and salutary declaration of public policy' that must 'be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged [misconduct].' The term 'source of information,' . . . 'means not only the identity of the person, but likewise includes documents, inanimate objects and all sources of information.'

Steaks Unlimited, Inc. v. *Deaner*, 623 F.2d 264 (3d Cir. 1980), (quoting *In re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963).

On the basis of the foregoing, I hold that if Carpenter were to testify at trial to the statements allegedly made by the unidentified Crime Commission officials, those statements would be admissible. Accordingly, the statements contained in Carpenter's affidavit are admissible on this motion for summary judgment.

5 Russell Bufalino testified in deportation proceedings before the Immigration and Naturalization Service, that Charles J. Bufalino, the lawyer, was a cousin of his. Plaintiff's Ex. 7 at 776. Plaintiff's uncle, William Bufalino, also stated that he is related to Russell Bufalino of Kingston, Pennsylvania, in an affidavit sworn to on February 15, 1967. This affidavit was made in connection with Russell Bufalino's deportation case. Plaintiff's Ex. 6. Finally, the Final Report of the Select Committee on Improper Activities in the Labor or Management

information about Russell Bufalino's family relationships unambiguously disclose the purported relationship between Russell Bufalino and Charles J. Bufalino, Sr., plaintiff's deceased father, and Russell Bufalino and William Bufalino, plaintiff's uncle. Although these documents do not mention any relationship between plaintiff and Russell Bufalino, they lead ineluctably to the conclusion that Charles J. Bufalino, Jr. is related to Russell Bufalino. Consequently, I find that AP also may rely on these documents in establishing that the statement that plaintiff is related to Russell Bufalino is a fair and accurate statement of information contained in official reports.

Based upon all of the foregoing, I find that no question of fact exists with respect to whether defendant's statement that plaintiff Charles J. Bufalino, Jr. is related to Russell Bufalino is a fair and accurate report of information contained in official documents.

There also is no question of fact concerning whether the statement that Russell Bufalino has been identified as a Mafia boss by state and federal officials is a fair and accurate report of information contained in official state and federal documents. In Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, dated July 30, 1964, it is reported that Russell Bufalino is "one of the most ruthless and powerful leaders of the Mafia in the United States." P's Ex. 10 at 1016.[6]

Field of the United States Senate, dated March 28, 1960, states as follows: "Russell Bufalino . . . is a cousin of William E. Bufalino, the head of local 985 of the Teamsters Union in Detroit." Plaintiff's Ex. 8. It is undisputed that William Bufalino is plaintiff's uncle. Plaintiff's Rule 9(g) statement, ¶ 9.

6 Although the news stories did not explicitly credit the FBI reports or the statements of the unidentified Crime Commission officials as the sources of their information, the statements when taken in context, may reasonably be understood to inform the reader that the stories were based on FBI and Crime Commission reports. The articles therefore should be treated as summaries of purportedly "official" government reports. *See Medico* v. *Time, Inc.*, 643 F.2d at 139 n.17, (citing *Mathis* v. *Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 416 (E.D. Pa. 1978)).

The next statement that must be considered is the statement that plaintiff is an individual with alleged ties to organized crime. AP argues that there is ample evidence in reports of official government agencies establishing plaintiff's family, social, business, and professional dealings with organized crime to render the statement that he is an individual with alleged mob ties a fair and accurate summary of the statements contained in those reports.

As is apparent from the discussion above, plaintiff's family ties to organized crime are documented in several official reports. In addition, plaintiff's professional representation of individuals connected with organized crime was informally but officially reported to Carpenter by an unidentified official of the Pennsylvania Crime Commission. *See Mathis* v. *Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978); *Restatement (Second) of Torts* § 611, Comments d & e (1977).[7]

Although plaintiff vigorously disputes the truth of these statements, I am constrained to conclude that the statement that plaintiff is "an individual with alleged mob ties" is a fair and accurate summary of information contained in official reports. While the phrase "alleged mob ties" may be interpreted to mean financial, criminal and social ties rather than or in addition to family relationship and professional representation of clients,[8] I find these alternate interpretations untenable

7 As discussed in the Restatement:

> The privilege covered in this Section extends to the report of any official proceeding, or any action taken by any officer or agency of the government of the United States, or of any State or of any of its subdivision. . . . [T]he privilege includes the report of any official hearing or meeting, even though no other action is taken. The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege. The privilege is thus applicable to the report of proceedings before any court . . . .

Restatement (Second) of Torts § 611, Comments d & e (1977).

The Restatement does not consider reports of pleadings to be covered by the privilege unless some official action has been taken by the court with respect to the action. *Id.* at Comment e.

8 The court is reluctant to conclude that the statement that an individual represents clients with alleged mob ties or evidence of

in the context of the AP stories. Both stories, after using the phrase "alleged mob ties" proceed to mention the purported family link between plaintiff and Russell Bufalino. Under the circumstances, the only fair interpretation of the phrase "alleged mob ties" as used in the AP stories, and indeed, the only one suggested in the stories, is family ties. Since, as noted above, the purported family ties between plaintiff and Russell Bufalino are well-documented in official reports, I must conclude that the statement is a fair and accurate summary of information contained in official reports.

The next issue that must be considered in assessing AP's fair report defense is whether there is a question of fact as to whether AP employees acted for the sole purpose of harming plaintiff. The employees of AP responsible for the publication of the statements in question, Paul Carpenter, Robert Dvorchak, and Herbert Pelkey, all have stated in sworn affidavits that they did not write any stories for the purpose of harming the plaintiff and plaintiff has not offered a shred of evidence to refute this. Affid. of Paul Carpenter, sworn to June 2, 1980 at ¶ 14; Affid. of Robert Dvorchak, sworn to June 2, 1980, at ¶ 9; Affid. of Herbert Pelkey, sworn to June 4, 1980 at ¶ 8. "When a motion for summary judgment is made and supported [by affidavit], an adverse party may not rest upon . . . his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56. Consequently, I find that plaintiff has failed to raise a question of fact with respect to whether AP employees acted for the sole purpose of harming him.

Based upon the foregoing, I hold that each of the three statements in issue was protected by the fair report privilege and that summary judgment should be granted for defendant on the basis of the fair report privilege.

Even if questions of fact were to exist with respect to whether AP's statement that plaintiff is an individual with

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litigation backs evidencing representation of individuals believed to be connected with organized crime is more than an indication of professional representation.

alleged mob ties is a fair summary of information contained in an official report, I find that there are no questions of fact as to whether AP acted with actual malice as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and that summary judgment for AP is appropriate on this ground as well.

Although AP sets forth several arguments in support of the application of the actual malice standard, the court will confine its discussion to plaintiff's status as a public official.

Plaintiff is the Borough Solicitor for the Borough of West Pittston, Pennsylvania and was the Borough Solicitor at the time of the alleged libel. The Borough Solicitor is appointed by the Borough Council which is an elected body of legislators. The function of the Borough Solicitor is to advise the Council in legal matters when his advice is sought from the Council as a whole or a majority thereof. The Borough Solicitor is compensated on a yearly basis from the Borough budget. Accordingly, plaintiff must be considered a public official for purposes of first amendment analysis. *See Time, Inc.* v. *Pape*, 401 U.S. 279 (1971) (Deputy Chief of Detectives of Chicago Police Department is public official).

To prevail on his claim, a public official must prove with convincing clarity that the defendant published false statements, knowing of their falsity or with reckless disregard of the truth. Consequently, this court must determine whether there is a genuine issue of material fact with respect to whether the statement that plaintiff is an individual with alleged mob ties was false and whether AP acted with actual malice, that is with knowledge that the statement was false or with reckless disregard of whether the statement was false or not. *See Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 299 (1971); *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 275 (3d Cir. 1980).[9]

Plaintiff has vigorously disputed that he is in any way connected with any criminal activities, organized or otherwise. He further contends that he is not related to Russell Bufalino.

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9 There is no question that a charge of alleged ties to organized crime is relevant to the issue of plaintiff's fitness to hold public office. *See Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300 (1971).

He has presented the affidavit of Ettore S. Agolino, an individual who claims to have personal knowledge of the histories of the various Bufalino family lines, which states that there is no blood relationship between plaintiff and Russell Bufalino. In addition, plaintiff has submitted the affidavit of Wayne Smith, a former agent of the FBI in the Philadelphia Division, with the responsibility between 1965 and 1976 of investigating organized crime in the Wilkes-Barre-Scranton area. Mr. Wayne stated that to his "knowledge, plaintiff has never been involved in any organized criminal activities nor in any criminal activity." He also stated that he has "known Charles J. Bufalino, Jr., for about ten (10) years and know[s] him to be a reputable attorney, a respected individual in his community, and a good citizen. . . . "

Thus, although AP has submitted numerous records which indicate legal representation and other relationships with certain individuals purportedly associated with organized crime, the affidavits submitted by plaintiff are sufficient to raise genuine issues of fact as to the truth of the statement that plaintiff has alleged ties to organized crime. For the reasons that follow, however, I find that there are no questions of fact concerning whether AP published the statement that Charles Bufalino, Jr. is an individual with alleged mob ties knowing of its falsity or with reckless disregard for the truth. *See Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 276-77 (3d Cir. 1980).

In analyzing whether AP acted with reckless disregard of the truth or with knowledge that the statement was false, the actions of Paul Carpenter in investigating whether Charles J. Bufalino, Jr. had "alleged mob ties" must be considered. As previously noted, Carpenter examined Pennsylvania Crime Commission reports, AP files and his own files, and contacted two other reporters as well as the Pennsylvania Crime Commission in an effort to verify his information about plaintiff. He received verification from one reporter and two Crime Commission officials that plaintiff was related to Russell Bufalino and one reporter stated that he was "pretty sure" that the two were related. In addition, one official from the Crime Commission stated that Bufalino represented clients whom the

Crime Commission believed to be connected with organized crime.

Plaintiff has not disputed these facts. His only contention with respect to the actual malice issue is that plaintiff was aware that there was more than one Charles Bufalino and that plaintiff should have been on notice as to the reliability of the information concerning plaintiff's purported family relationship with Russell Bufalino when Paul Gollas of the *Wilkes-Barre Times-Leader Evening News* was not certain as to the family relationship.

As plaintiff has failed to raise a genuine issue of fact about the procedures employed by AP in verifying its information and has presented nothing more than the bald assertion that Carpenter and Dvorchak had no reason to believe that the dispatches were accurate, the issue of whether AP acted with actual malice will be decided as a matter of law.

In *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the Court ruled that "for libel against a public figure to be proved, '[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.' " *Dickey* v. *CBS, Inc.*, 583 F.2d 1221, 1223 (3d Cir. 1978) (quoting *St. Amant* v. *Thompson*, 390 U.S. at 731). The record in this case is completely devoid of evidence of actual malice. The statements concerning plaintiff were published only after Carpenter reviewed AP files and his own files and only after consultation with five other individuals who were known by Carpenter to be reliable and knowledgeable. The fact that one of the sources contacted by Carpenter was uncertain that plaintiff and Russell Bufalino were related is insufficient to create an inference that Carpenter or Dvorchak entertained serious doubts about the truth of the publications. *See Dickey* v. *CBS, Inc.*, 583 F.2d at 1227-29.

CONCLUSION

In accordance with the above, summary judgment is granted with respect to the statements that plaintiff is related to Russell Bufalino, identified by state and federal officials as a Mafia boss and that plaintiff is an individual with alleged mob ties. Defendant is directed to submit judgment on notice within 10 days after entry of this order.

SO ORDERED.

Dated: New York, New York
January 25, 1982

/S/ HENRY F. WERKER
U.S.D.J.

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U.S. Court of Appeals, Third Circuit
Decision in *Medico* v. *Time, Inc.*

No. 80-2077.

United States Court of Appeals, Third Circuit.

Argued Dec. 1, 1980.

Decided March 2, 1981.

Rehearing and Rehearing In Banc
Denied March 27, 1981.

MEDICO, Philip T.,

Appellant,

—v.—

TIME, INC.

Before

ADAMS, GARTH and SLOVITER,

Circuit Judges.

F. Emmett Fitzpatrick, Jr., Philadelphia, Pa., Charles J. Bufalino, Jr. (Argued), West Pittston, Pa., for appellant.

Peter Hearn (Argued). M. Duncan Grant, Richard W. Foltz, Jr., Pepper, Hamilton & Scheetz, Philadelphia, Pa., for appellee, Robert P. Marshall, Jr., Time Inc., New York City, of counsel.

OPINION OF THE COURT

ADAMS, Circuit Judge.

This appeal from a summary judgment in favor of the defendant presents an important question concerning the law of defamation. We must review the district court's determina-

tion that a news magazine enjoys a privilege, under the common law of Pennsylvania, to publish a summary of FBI documents identifying the plaintiff as a member of an organized crime "family." We affirm.

I.

In its March 6, 1978 issue, Time magazine published an article describing suspected criminal activities of then-Congressman Daniel J. Flood. The article stated that Stephen Elko, a former Flood aide, had characterized the Congressman as a "muscler"—an official who used his considerable influence to direct federal contracts to individuals and companies that responded with cash. The article further stated that at least eight separate United States Attorneys' offices had undertaken investigations of Flood's activities.

As an example of suspected misconduct, the Time article listed the following:

> Among the matters under scrutiny: Ties between Flood and Pennsylvania Rackets Boss Russell Bufalino. The suspected link: the Wilkes-Barre firm of Medico Industries, controlled by President Philip Medico and his brothers. The FBI discovered more than a decade ago that Flood steered Government business to the Medicos and traveled often on their company jet. Investigators say Bufalino frequently visited the Medico offices; agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family. Elko's testimony has sparked new investigative interest in the Flood-Medico-Bufalino triangle.

Circulation of the March 6, 1978 issue of Time exceeded four million copies.

Following publication of the article, Medico instituted a defamation action against Time, Inc., in federal district court on the basis of diversity jurisdiction.[1] Medico alleged that the

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1 28 U.S.C. § 1332(a) (1976). At the time he filed the complaint, Medico was a citizen of Pennsylvania. Time, Inc., is incorporated

article's import was that he held a high position in an organized criminal society.

Time initially moved for summary judgment in June 1979. It asserted that the substance of the article was not that Medico actually participated in criminal activities, but only that FBI agents had recorded Russell Bufalino's description of Medico as a Mafia *capo*. Time argued that this latter statement was true. In support of its motion, Time submitted the affidavit of John Danahy, a former FBI official, and two documents—an FBI report on "La Cosa Nostra, Philadelphia Division," and a personal profile report on Philip Medico—which Danahy identified as official FBI documents. Both documents state that an "informant" alternately code-named "PHT-3" and "PH 591-C*" has identified Medico as a close associate of Russell Bufalino and a "capo" or "capodecina" in La Cosa Nostra. The affidavit states that La Cosa Nostra is the FBI's term for the Mafia, and that the "informant" was not a person, but an electronic listening device, by means of which a recording had been made.

The district court agreed with Time that the substance of the allegedly defamatory article was that the FBI had recorded Bufalino's identification of Medico as an underworld leader. It concluded, however, that the supporting documents which Time submitted did not resolve all genuine issues concerning the truth of its report. Although the FBI documents corroborated the Time article, the court ruled that the affidavit Time had advanced to authenticate the documents was not based on the personal knowledge of the affiant, as required by Rule 56(e). The court therefore denied Time's motion for summary judgment.

In January 1980, Time again moved for summary judgment based on the substantial truth of its publication. Time resubmitted the two FBI documents it had proffered to support its initial motion, supplemented with affidavits of two FBI agents. One affiant, David Breen, had supervised an investigation of

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under the laws of Illinois with its principal place of business in New York.

organized crime that the FBI's Philadelphia Office had conducted. He stated that the Philadelphia Office had prepared the report on La Cosa Nostra at his direction, and that Medico's personal profile card had been prepared and maintained by the FBI. Breen further stated that, based on his personal experience with the FBI, he knew from the code names assigned the "informant" that the information in the documents was derived from a tape-recording made by means of an electronic listening device and transcribed by highly trained individuals capable of identifying the voices of the persons recorded. The other affiant, Patrick Collins, also had served in a supervisory position with the FBI. He confirmed Breen's interpretation of the documents, primarily on the basis of his "general experience with similar such reports."

On this occasion the district court granted Time's motion for summary judgment, but not on the basis of the truth defense. The court expressed doubt about its earlier conclusion that, in order to prevail on a truth theory, Time need only establish that FBI agents recorded Bufalino's description of Medico, rather than that Medico was in fact a Mafia chieftain. The court acknowledged that Pennsylvania law might require proof of the underlying assertion, but decided it did not have to resolve the issue; the court concluded that, whether the statement sued upon be given a broad or narrow scope, the evidentiary affidavits that Time submitted failed to establish the truth defense. Although the court found that the affidavits established the authenticity of the FBI report and personal file card as FBI materials, it also determined that neither affiant had personal knowledge of the "factual basis" for the documents. Neither Breen nor Collins had installed the listening devices allegedly used in recording Bufalino's conversations, had transcribed the recorded conversations, or had personal knowledge of the identity of all the participants in the relevant conversations.

After declining to hold for Time on the truth theory, the district court considered whether the Time article fell within the common law privilege accorded the press to report on official proceedings. The judge seemed troubled because Penn-

sylvania courts apparently had so far extended the privilege only to reports of proceedings open to the public, whereas Time had summarized reports which the FBI had kept secret and whose release to Time evidently had been unauthorized. But after an exhaustive analysis of Pennsylvania precedents, the court concluded that Pennsylvania courts, if presented with the question, would find summaries of non-public government reports within the privilege. The district judge then ascertained that the Time article represented a fair and accurate account of the FBI documents. Accordingly he held that the publication was privileged, and awarded summary judgment in favor of Time.

On appeal, Medico argues that the district court incorrectly determined that Time's publication was privileged under Pennsylvania law. Time counters that the district judge accurately construed the applicable state law on privilege, and contends further that the defense of truth applies and affords an alternate basis for affirming the district court. Our analysis of the district court's result will entail examination of the state law precedents regarding the fair report privilege, of the policies underlying them, and of Constitutional constraints on defamation law.[2]

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2 A threshold inquiry is which state's substantive law applies to this diversity action. The parties implicitly agree that Pennsylvania law governs, and the district court applied Pennsylvania law. Inasmuch as Pennsylvania has an interest in the outcome of this litigation—the target of the alleged defamation is a Pennsylvania resident and the issue of Time magazine containing the allegedly libelous article was circulated throughout the state—this Court has no cause sua sponte to challenge the choice of Pennsylvania law. *See Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 269-70 (3d Cir. 1980); *Pierce* v. *Capital Cities Communications, Inc.*, 576 F.2d 495, 501-02 (3d Cir.), *cert. denied*, 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed. 2d 170 (1978).

Under Pennsylvania law, a defamation claim consists of two basic elements. First, the communication must be defamatory in nature and understood as such by the recipient. *Corabi* v. *Curtis Publishing Co.*, 441 Pa. 432, 441-42, 273 A.2d 899, 904 (1971); 42 Pa. Cons. Stat. Ann. § 8343(a)(1) to (4) (Supp. 1979). Before this court, Time does not dispute the defamatory nature of its statements concerning Medico. Second, the communication must be uttered maliciously—that is,

II.

The fair report privilege on which the district court relied developed as an exception to the common law rule that the republisher of a defamation was subject to liability similar to that risked by the original defamer.[3] Pennsylvania had adopted the republication rule by the turn of the century,[4] and no case brought to our attention suggests that Pennsylvania has abandoned it.[5] With this rule, the law indulged the fiction that the republisher of a defamatory statement "adopted" the statement as his own.[6] The common law regime created special problems for the press. When a newspaper published a newsworthy account of one person's defamation of another, it was, by virtue of the republication rule, charged with publication of the underlying defamation. Thus, although the common law

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intentionally or negligently and "without just cause or excuse." *Corabi* v. *Curtis Publishing Co.*, 441 Pa. at 451, 273 A.2d at 909; 42 Pa. Cons. Stat. Ann. § 8344 (Supp. 1979). This malice component is "implied or presumed to exist from the unprivileged publication of defamatory words actionable per se." *Corabi* v. *Curtis Publishing Co.*, 441 Pa. at 451, 273 A.2d at 909 (emphasis deleted). On this appeal, then, the sole issue is whether Time can negate the presumption of malice by establishing that its publication was privileged.

3 *See* W. Prosser, Handbook of the Law of Torts 798 & n.13 (4th ed. 1971); Note, *Privilege to Republish Defamation*, 64 Colum. L. Rev. 1102, 1102 (1964).

4 *See Oles* v. *Pittsburgh Times*, 2 Pa. Super. 130, 142 (1896) ("One who . . . repeats a defamatory accusation is deemed to have published it, and is liable to action although he gives the name of the author."); *Stepp* v. *Croft*, 18 Pa. Super. 101 (1901).

5 *Cf. Hoover* v. *Peerless Publications, Inc.*, 461 F. Supp. 1206, 1208 (E.D. Pa. 1978) (construing Pennsylvania law) (citing "the black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher").

6 *See* R. Sack, Libel, Slander, and Related Problems § 11.6.1, at 86-87 (1980); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 262-63 (1976).

exonerated one who published a defamation as long as the statement was true,[7] a newspaper in these circumstances traditionally could avail itself of the truth defense only if the truth of the underlying defamation were established.[8]

To ameliorate the chilling effect on the reporting of newsworthy events occasioned by the combined effect of the republication rule and the truth defense, the law has long recognized a privilege for the press[9] to publish accounts of official proceedings or reports even when these contain defamatory statements. So long as the account presents a fair and

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7 *See* Restatement (Second) of Torts § 581A (1977).

8 The following example is given in *Oles* v. *Pittsburgh Times*, 2 Pa. Super. 130, 142 (1896): if J.S. publishes that he heard J.A. say that J.G. was a traitor or a thief, then "J.S. must prove that J.G. was a traitor or a thief in order to make a complete defense."

Although the common law placed the burden of proving truth on the defendant, this allocation may run afoul of recently announced constitutional principles. *See* note 38 *infra*. Because we dispose of the present case on the basis of the fair report privilege, we have no occasion to resolve this constitutional issue, or to consider whether Pennsylvania courts would continue to apply the republication rule to a newspaper account of defamatory remarks, *see* Part VII & note 42 *infra*.

9 There is some dispute whether the privilege is available to non-press defendants. The *Restatement* suggests that "any person who makes an oral, written or printed report" on an official proceeding should have access to the defense. Restatement (Second) of Torts § 611, Comment c (1977). While some states adhere to this approach, *see, e.g.*, N.Y. Civil Rights Law § 74 (McKinney 1976); Ohio Rev. Code Ann. § § 2317.04-05 (Page 1953); Okla. Stat. tit. 12, § 1443 (1971), other states grant the privilege only to specified press defendants, *see, e.g.*, Mich. Comp. Laws Ann. § 600.2911(3) (West 1968) ("reporter, editor, publisher or proprietor of a newspaper"); N.J. Stat. Ann. § 2A:43-1 (West Supp. 1976) ("publication in any newspaper"). Although Pennsylvania, as far as we can tell, has not delineated the availability of the privilege, in light of the identity of defendant Time, Inc., we need not decide at this time whether Pennsylvania would allow non-media defendants to claim the fair report privilege.

accurate summary of the proceedings,[10] the law abandons the assumption that the reporter adopts the defamatory remarks as his own.[11] The privilege thus permits a newspaper or other press defendant to relieve itself of liability without establishing the truth of the substance of the statement reported. The fair report privilege has a somewhat more limited scope than the truth defense, however. So long as the speaker establishes the truth of his statement, he is shielded from liability, regardless of his motives; the fair report privilege, on the other hand, can be defeated in most jurisdictions by a showing that the publisher acted for the sole purpose of harming the person defamed.[12]

Unlike many states,[13] Pennsylvania has never codified the fair report privilege. In addition, while Pennsylvania follows

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10 *See* Restatement (Second) of Torts § 611 (1977); W. Prosser, *supra* note 3, at 832.

11 *See* R. Sack, *supra* note 6, § VI.3.7, at 316 & n.213. Analytically, the fair report privilege is similar to the truth defense. Both make verity the issue, although requiring that a report be fair and accurate may allow the press a somewhat greater margin of error than requiring that its report be true. In those cases where a plaintiff claims that republication of an official report defamed him *not* by conveying the underlying defamation, but by leading the reading public to believe that a government agency had leveled defamatory charges against him, the two defenses are effectively "merged." The common law defense of truth would turn on whether the government actors had in fact so charged the plaintiff, and the fair report privilege would focus on the same inquiry. *See* Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U.L.Rev. 469, 506-07 (1979).

12 *See* 1 F. Harper & F. James, The Law of Torts 450-56 (1956). For this reason, truth generally is referred to as an "absolute," and fair report as a "conditional," privilege. *See generally* Sack, *supra* note 6, § VI.1.

13 For examples of statutory versions of the privilege, see Cal. Civ. Code § 47 (West 1954); Ga. Code Ann. § 105-704 (1978); N.J. Stat. Ann. § 2A:43-1 (West Supp. 1978); N.Y. Civil Rights Laws § 74 (McKinney 1976); Ohio Rev. Code Ann. § 2317.04 (Page 1953); Wis.

the *Restatement (Second) of Torts* on most matters,[14] the Pennsylvania Supreme Court evidently has not yet had occasion to comment on the *Restatement*'s version of the fair report privilege. Earlier, however, the state courts had endorsed the privilege as set forth in the original *Restatement*,[15] and this edition was similar in most respects to the more recent one. We believe it appropriate to accept as the law of Pennsylvania the version of the fair report privilege embodied in the current *Restatement*.[16]

Section 611 of *Restatement (Second)* provides:

> Report of Official Proceeding or Public Meeting
>
> The publication of defamatory matter concerning another

Stat. § 895.05 (1975). Application of the privilege varies from state to state. *See* Comment, *Constitutional Privilege to Republish Defamation*, 77 Colum. L. Rev. 1266, 1275 n.72 (1977).

14 *See Gilbert* v. *Korvette, Inc.*, 457 Pa. 602, 611 n.25, 327 A.2d 94, 100 n.25 (1974) ("In recent years, this Court has not hesitated to adopt sections of the Restatement (Second) of Torts (1965) when our common-law precedents varied from the Restatement or when the Pennsylvania common law provided no answer.").

15 *See Binder* v. *Triangle Publications, Inc.*, 442 Pa. 319, 324, 275 A.2d 53, 56 (1971); *Purcell* v. *Westinghouse Broadcasting Co.*, 411 Pa. 167, 177, 191 A.2d 662, 667 (1963); *Sciandra* v. *Lynett*, 409 Pa. 595, 600, 187 A.2d 586, 589 (1962). Section 611 of the original Restatement of Torts provided:

> REPORTS OF JUDICIAL, LEGISLATIVE, AND EXECUTIVE PROCEEDINGS.
>
> The publication of a report of judicial proceedings, or proceedings of a legislative or administrative body or an executive officer of the United States, a State or Territory thereof, or a municipal corporation or of a body empowered by law to perform a public duty is privileged, although it contains matter which is false and defamatory, if it is (a) accurate and complete or a fair abridgment of such proceedings, and (b) not made solely for the purpose of causing harm to the person defamed.

16 *Accord, Mathis* v. *Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 415 (E.D. Pa. 1978); *see Hanish* v. *Westinghouse Broadcasting Co.*, 487 F. Supp. 397 (E.D. Pa. 1980) (assuming without elaboration that § 611 of Restatement (Second) represents the law of Pennsylvania).

> in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

With respect to the present controversy, the basic inquiry is whether Time's summary of FBI documents concerning Philip Medico is "a report of an official action or proceeding."[17]

The district court examined and rejected the possibility that the FBI reports in question are not "official" because they are not generally available to the public. Medico does not challenge this reasoning on appeal, and we perceive no need to rehearse arguments that the district court has already canvassed. Medico contends before this Court that the FBI documents should not be deemed "official" because they express only tentative and preliminary conclusions that the FBI has never adopted as accurate. He points out that the title page to the FBI report on La Cosa Nostra bears the following legend: "This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency."

Neither the text of Section 611 nor the accompanying comments dispose of the issue Medico raises. Section 611 itself

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17 Although the Time article did not explicitly credit the FBI Report on La Cosa Nostra or the FBI personal file card on Medico as the Magazine's sources of information, the statements about Medico, taken in context, may reasonably be understood to inform the reader that the story was based on FBI materials. The article should accordingly be regarded as a summary of a purportedly "official" government report. *See Mathis* v. *Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 416 (E.D. Pa. 1978) (articles summarizing information supplied by Philadelphia Police Department were accounts of governmental reports and hence within Section 611, even though the articles did not expressly identify the Department as the source of the information); *cf.* R. Sack, *supra* note 6, § VI.3.7.5, at 325 (if the publication does not inform the reader of the identity or nature of the government proceeding, it probably is not a fair and accurate report).

speaks only of "official" action or proceedings, without elaborating on when a statement is made in an official capacity. Comment d provides some support for locating the FBI documents concerning Medico within the scope of the privilege. That comment states: "The filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege." In the present case, the FBI included its information on Medico in a report on the Philadelphia activities of the Mafia, and forwarded it for inclusion in a report on nationwide organized crime.

But another comment casts doubt on the applicability of the fair report privilege to the FBI materials. Comment h indicates that, while a report of an arrest or of the charge of crime falls within the privilege, "statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of [a] judicial proceeding or of the arrest itself and are not privileged." Because the FBI's information concerning Medico never led to an arrest or prosecution, the FBI materials may be thought to stem from such an early stage of official proceedings that the Section 611 privilege does not attach.

Pennsylvania cases predating the publication of *Restatement (Second)* also fail to resolve definitively whether summaries of criminal investigatory files fall within the privilege. The two cases most nearly on point, however, strongly support Time's defense. In *Sciandra* v. *Lynett*, 409 Pa. 595, 187 A.2d 586 (1963), the defendant newspaper had published three articles based on the "Reuter Report," a study, commissioned by then-Governor of New York, Averell Harriman, of the activities and associations of individuals who had attended a meeting of alleged organized crime figures.[18] The Pennsylvania Supreme Court held the newspaper's publication protected, announcing the fair report privilege in broad terms: "Upon the

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18 Interestingly, one of the alleged crime figures examined by the Reuter Report is Russell Bufalino.

theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government." *Id.* at 600, 187 A.2d at 588. As in the present case, there is no indication that the Reuter Report had led to the arrest or criminal prosecution of any suspected wrongdoer. The Reuter Report, however, bore stronger indicia of representing an "official" act than the FBI materials here: it was filed with the Governor and then released to the public, it evidently did not bear a legend indicating that it reached only tentative conclusions, and it resulted from an inquiry into the history and habits of organized crime figures that occupied New York State officials for several months. While *Sciandra* affords some basis for predicting that Pennsylvania would extend the fair report privilege to the publication challenged in this case, we doubt whether, standing alone, *Sciandra* disposes of this issue.[19]

A decision by a federal district court construing Pennsylvania law also supports application of the privilege to Time's publication. In *Hanish* v. *Westinghouse Broadcasting Co.*, 487 F. Supp. 397 (E.D.Pa. 1980), the court held that the privilege applied to a news report summarizing a civil complaint that contained defamatory accusations and that had formed the basis for a temporary restraining order.[20] The court approvingly quoted Justice Holmes' statement in *Cowley* v. *Pulsifer*, 137 Mass. 392 (1884), that "[i]f pleadings and other

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19 Other Pennsylvania cases applying the fair report privilege cast little light on the question here, inasmuch as they involved reports of clearly official proceedings. *See Binder* v. *Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53 (1971) (account of proceedings in open court at criminal trial); *Purcell* v. *Westinghouse Broadcasting Co.*, 411 Pa. 167, 191 A.2d 662 (1963) (same).

20 Although the Court found the publication within the ambit of the privilege, it denied defendant's motion for summary judgment because it determined that plaintiff had raised a genuine issue of material fact concerning whether the publication fairly and accurately summarized the contents of the complaint.

documents can be published to the world by anyone who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting those printed as news"; the district court concluded nonetheless that, at least when some judicial action has been taken on a complaint, the fair report privilege applies.[21]

Assuming the court in *Hanish* correctly predicted Pennsylvania law, we think that decision supports application of the Section 611 privilege to the present case. FBI files seem at least as "official" as the pleadings in civil cases. Although civil complaints are instituted, for the most part, by private parties, the FBI documents concerning Medico were compiled by government agents acting in their official capacities. Moreover, the danger that a civil litigant will willfully insert defamatory assertions in his complaint generally would appear at least as great as the risk that a criminal investigatory agency will knowingly include false or malicious statements in its files. If Pennsylvania courts would grant the privilege to newspaper accounts of civil complaints on which a court has acted ex parte, we think it likely that they would grant the privilege to republication of defamatory items from the FBI materials on Medico.

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21 Considerable controversy surrounds republication of defamations contained in pleadings on which no official action has been taken. Although Comment e to Section 611 of the Restatement excludes such pleadings from the scope of the privilege, Professor Eldredge writes that "the weight of authority is contrary to the [*Restatement*] rule, and is that the report of pleadings filed in court which have not yet come before a judicial officer and upon which no judicial action has been taken comes within the privilege." L. Eldredge, The Law of Defamation § 79(b)(1), at 430 (1978). *Compare Campbell* v. *New York Evening Post*, 245 N.Y. 320, 157 N.E. 153 (1927) (reports of preliminary proceedings are privileged), and *American Dist. Tel. Co.* v. *Brinks, Inc.*, 380 F.2d 131, 133 (7th Cir. 1967) (same), *with Cowley* v. *Pulsifer*, 137 Mass. 392 (1884) (report of preliminary proceedings not privileged).

III.

Three policies underlie the fair report privilege, and an examination of them provides further guidance for our decision today. Initially, an agency theory was offered to rationalize a privilege of fair report: one who reports what happens in a public, official proceeding acts as an agent for persons who had a right to attend, and informs them of what they might have seen for themselves.[22] The agency rationale, however, cannot explain application of the privilege to proceedings or reports not open to public inspection.[23]

A theory of public supervision also informs the fair report privilege. Justice Holmes, applying the privilege to accounts of courtroom proceedings, gave the classic formulation of this principle:

> [The privilege is justified by] the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility

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22 Thus in *Curry* v. *Walter*, 126 Eng. Rep. 1046 (C.P. 1796), perhaps the earliest reported case recognizing the privilege, *see* Sowle, *supra* note 11, at 478, Chief Justice Eyre instructed the jury that it is not unlawful to publish "a true account of what took place in a court of justice which is open to all the world." The theory seems to be that because a member of the public could have witnessed the defamation, he is entitled to be informed of it. For an argument that the agency rationale confuses elements that justify republication with those that merely indicate when the privilege may exist, see Note, *supra* note 3, at 1116.

23 Courts still occasionally invoke the agency rationale, *see Coleman* v. *Newark Morning Ledger Co.*, 29 N.J. 357, 387, 149 A.2d 193, 209 (1959) (Weintraub, J., dissenting); *Borg* v. *Boas*, 231 F.2d 788, 794 (9th Cir. 1956) (construing Idaho Law). *See also* Restatement (Second) of Torts § 611, Comment d (1977) ("It is not clear whether the privilege extends to a report of an official proceeding that is not public or available to the public under the law.")

> and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Cowley v. *Pulsifer*, 137 Mass. 392, 394 (1884). The supervisory rationale has been invoked in the context of executive action as well.[24]

We believe the public supervision rationale applies to the present case. As public inspection of courtroom proceedings may further the just administration of the laws, public scrutiny of the proceedings and records of criminal investigatory agencies may often have the equally salutary effect of fostering among those who enforce the laws "the sense of public responsibility." For example, exposing the content of agency records may, in some cases, help ensure impartial enforcement of the laws.

It is not necessary for us to decide, however, whether the supervisory rationale is relevant to every republication of documents found in FBI files. For any general supervisory concern with respect to the FBI is heightened in the present case by the public's interest in examining the conduct of individuals it elects to positions of civic trust. Elected officials derive their authority from, and are answerable to, the public. If the citizenry is effectively and responsibly to discharge its obligation to monitor the conduct of its government, there can be no penalty for exposing to general view the possible wrongdoing of government officials. Because the alleged defamation of Medico occurred in an article analyzing the conduct of former Congressman Flood, we believe it implicates this aspect of the supervisory rationale. Moreover, even though Time's publication arguably may have tarnished the reputation of Medico, a private individual,[25] as well as that of Representa-

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24 *See* Note, *supra* note 3, at 1108-09.

25 We need not decide whether Medico is a "public figure" for constitutional purposes. Beginning with *New York Times* v. *Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 725-26, 11 L.Ed. 2d 686 (1964), the Supreme Court has required that "public officials" may not

tive Flood, the public has a lively interest in considering the relationships formed by elected officials.[26]

A third rationale for the fair report privilege rests, somewhat tautologically, on the public's interest in learning of important matters.[27] While "mere curiosity in the private affairs of others

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recover in actions for defamation unless they prove that the defendant published false material, knowing of its falsity or with reckless disregard of the truth. The Supreme Court later extended this same protection to defendants in defamation suits brought by "public figures," *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L.Ed. 2d 1094 (1967), a class the Supreme Court delineated more specifically on *Gertz* v. *Robert Welch Publishing Co.*, 418 U.S. 323, 342-45, 351-52, 94 S. Ct. 2997, 3008-09, 3012-13, 41 L.Ed. 2d 789 (1974). Where the plaintiff is a "private figure," however, the First Amendment forbids states to impose liability without fault, but otherwise permits them to define for themselves the appropriate standard of liability. *Id.* at 347, 94 S. Ct. at 3010. Although Time argued, in connection with its initial summary judgment motion, that Medico was a public figure, Time withdrew this argument after the Supreme Court indicated in *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9, 99 S. Ct. 2675, 2680 n.9, 61 L.Ed. 2d 411 (1979), that the "actual malice" issue generally should go to the jury.

26 *See* Sowle, *supra* note 22, at 485-86.

27 *See* Note, *supra* note 3, at 1111-16. The Pennsylvania Supreme Court appeared to embrace this rationale in *Sciandra* v. *Lynett*, 409 Pa. 595, 600, 187 A.2d 586, 587, 588 (1963): "Upon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government." *See also Barto* v. *Felix*, 250 Pa. Super. 262, 267, 378 A.2d 927, 929-30 (1977).

Some jurisdictions rely on the informational rationale to extend the privilege to accounts of the proceedings of public meetings of private, nongovernmental organizations, as long as the meeting deals with matters of concern to the public. *See Barrows* v. *Bell*, 73 Mass. (7 Gray) 301, 313 (1856); *Pinn* v. *Lawson*, 72 F.2d 742 (D.C. Cir. 1934) (meeting of parish church board); *Borg* v. *Boas*, 231 F.2d 788, 794-95 (9th Cir. 1956) (meeting calling on judge to convene grand jury). The British Defamation Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, § 7, extended the privilege to reports of "proceedings at any public meeting

is of insufficient importance to warrant granting the privilege,"[28] the present case does not involve such idle probing. The Time article discussed two topics of legitimate public interest. First, for the same reasons that support the supervisory rationale, examination of the affairs of elected officials is obviously a matter of legitimate public concern. In addition, as various federal courts have already recognized, there is significant public importance to reports on investigations of organized criminal activities,[29] whether or not these implicate government officials.

Because the Time article focused on organized crime, we think the informational rationale is especially relevant. The district court in the case at hand commented on the difficulty of gathering information pertaining to organized criminal activity: "Due to the size, sophistication and secrecy of most organized criminal endeavors, only the largest and most sophisticated intelligence-gathering entities can monitor them effectively. In practice this task has been taken up primarily by the Justice Department of the federal government and, in particular, by the FBI." Indeed, the documents that Time summarized had been compiled by a government agency. In light of the difficulty in obtaining independent corroboration of FBI information, the press may often have to rely on

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. . . bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern."

28 Note, *supra* note 3, at 1111.

29 *See Miller* v. *News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971); *Time, Inc.* v. *Ragano*, 427 F.2d 219 (5th Cir. 1970); *Wasserman* v. *Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940, 90 S. Ct. 1844, 26 L.Ed. 2d 273 (1970). During the short-lived regime of *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed. 2d 296 (1971), which applied the *New York Times* standard to defamation actions arising out of reports on matters of public or general interest, courts frequently applied the "actual malice" requirement to actions based on accounts of organized criminal activities. *See Taskett* v. *King Broadcasting*, 86 Wash. 2d 439, 546 P.2d 81, 100 (1976) (Horowitz, J., dissenting).

materials the government acquires if it is to report on organized crime at all. We believe Time's publication of FBI materials mentioning Medico served a legitimate public interest in learning about organized crime.

Care must be taken, of course, to ensure that the supervisory and informational rationales not expand into justifications for reporting any defamatory matter maintained in any government file. Personal interests in privacy are not to be taken lightly, and are not to be overborne by mere invocation of a public need to know.[30] But we believe that the public interest is involved when, as here, information compiled by an enforcement agency may help shed light on a Congressman's alleged criminal or unethical behavior.

IV.

Constitutional considerations also help resolve the present dispute. Although the Supreme Court has never explicitly recognized a constitutional privilege of fair report, several of its recent decisions point toward that result. While we need not decide today whether the First Amendment requires a privilege for the press to report on official acts and proceedings regardless of whether they contain defamatory information, we find that analysis of the constitutional issues reinforces our prediction that Pennsylvania would, as a matter of common law, apply the fair report privilege to Time's publication about Medico.

Two cases from outside the field of defamation reflect the Supreme Court's recognition of the First Amendment value of

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30 The excesses of the McCarthy era, for example, prompted some commentators to point out the reputational injury the republication of official defamation can cause, and to advocate restricting the fair report privilege. *See* Pedrick, *Senator McCarthy and the Law of Libel: A Study of Two Campaign Speeches*, 48 Nw. U. L. Rev. 135 (1953); 13 Rutgers L. Rev. 723, 727 (1959). *See also Coleman* v. *Newark Morning Ledger Co.*, 29 N.J. 357, 149 A.2d 193 (1959) (serviceman previously unknown to public defamed by Senator McCarthy's summary of secret Congressional hearings; newspaper account held privileged.)

reports of official proceedings. In *Cox Broadcasting* v. *Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court ruled that the First Amendment precludes a cause of action for invasion of privacy brought about by publication of the name of a deceased rape victim. The Court noted: "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media." *Id.* at 495, 95 S.Ct. at 1046. In addition to these comments, which emphasize the informational rationale for the fair report privilege, the Court stressed the supervisory duties of the public: "The citizenry is the final judge of the proper conduct of public business. . . . With respect to judicial proceedings in particular, the function of the press serves . . . to bring to bear the beneficial effect of public scrutiny upon the administration of justice." *Id.* at 495, 492, 95 S.Ct. at 1046, 1044.

While *Cox Broadcasting* arose from a news report based on judicial records open to public inspection, the Court's commitment to dissemination of information of interest and value to the public seems just as apposite when, as here, the press reports on materials not open for inspection. Moreover, the Court in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), extended the protective mantle of the First Amendment to a report of a proceeding closed to the public. The Court there held that a state may not impose criminal sanctions on those who publish information regarding proceedings before a state judicial review commission, even when the state constitution and laws declare the proceedings confidential. The Court again stressed the need for public knowledge of the affairs of government: " 'A major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' . . . Neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here." *Id.* at 838, 841, 98 S.Ct. at 1541, 1542 (quoting *Mills* v. *Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484 (1966)).

Landmark Communications, like *Cox Broadcasting*, does not strictly control the issue before us—for *Landmark* arose in the context of criminal sanctions,[31] rather than a defamation suit, and plaintiff in *Landmark* was a public official.[32] But in both *Cox Broadcasting* and *Landmark Communications*, the Supreme Court articulated the First Amendment value of reports that inform the public of the affairs of government and assist the citizenry in its supervisory duties. In *Cox Broadcasting* these values applied in the context of a damage action instituted by a private figure, and in *Landmark Communications* they could not be overcome by the confidentiality of the materials reported on.[33] Since we have found that the publication at issue here implicates these informational and supervisory interests, *Cox* and *Landmark* provide a constitutional basis for applying a fair report privilege to a controversy which, like the present one, arises from a private figure's damage action for publication of reports not available to the public.

Closer to the facts in our case is *Time, Inc.* v. *Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971), which some

31 At least one commentator has remarked that "[t]he fact that the defendant in *Landmark* suffered a criminal sanction, as opposed to a civil liability for defamation, should have no bearing on the relevance to defamation law of the Court's reasoning." Sowle *supra* note 22, at 500. As the Supreme Court observed in *New York Times* v. *Sullivan*, 376 U.S. 254, 277, 84 S. Ct. 710, 724, 11 L.Ed. 2d 686 (1964), "the fear of damages awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."

32 Some language in *Landmark* suggests that the Court may have limited its reasoning to public officials; thus, the Court observed: "Our prior cases have firmly established . . . that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.' " 435 U.S. at 841-42, 98 S. Ct. at 1542-43 (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 272-73, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964)).

33 *Cf. New York Times Co.* v. *United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L.Ed. 2d 822 (1971) (classified status of Defense Department study of Viet Nam War does not justify prior restraint of newspaper publication).

commentators have interpreted as elevating the fair report privilege into a constitutional requirement.[34] *Pape* arose from a Time magazine article that quoted excerpts from a Report of the United States Commission on Civil Rights. One section of the Report, dealing with police brutality, listed in detail allegations against Pape and other Chicago police officers contained in a civil complaint; Time quoted the allegations without citing the complaint, arguably making it appear that the allegations were factual findings of the Commission.

The precise issue presented to the Supreme Court was whether there was sufficient evidence for a jury to conclude that Time magazine, in omitting to mention that the charges of brutality were allegations of a complainant rather than findings of the Commission, had published material it knew to be false, or had acted in reckless disregard of the truth.[35] The Court observed that it is often possible to separate the question of the truth of the publication from the question of whether the publisher had an adequate basis for believing his publication true. 401 U.S. at 285, 91 S.Ct. at 637. But not all cases are susceptible to this analysis: "A vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, speeches, press conferences, and the like. The question of the 'truth' of such an indirect newspaper report presents rather complicated problems." *Id.* at 285-86, 91 S.Ct. at 637 (emphasis in original). After analyzing the Time article in light of the Commission Report, the Court concluded that Time had

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34 *See* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1362 n.46 (1976); Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation; Predictability and the New Synthesis*, 70 Mich. L. Rev. 1547, 1555 (1972); W. Prosser, *supra* note 3, at 832.

35 Pape did not challenge the findings of the district court that he was a "public official." *See* 401 U.S. at 284, 91 S. Ct. at 636.

not engaged in a falsification sufficient to warrant a jury finding of actual malice.

While the fair report privilege was not at issue in *Pape*,[36] the Court's explicit recognition of the sensitive First Amendment problems that arise when the press publishes accounts of government reports and activities has not been lost on other federal courts. At least one court of appeals, citing *Pape*, has generalized this concern to create a constitutional privilege whenever the press republishes defamatory comments while reporting on newsworthy events. In *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed.2d 498 (1977), the Second Circuit stated:

> When a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. . . . What is newsworthy about such accusations is that they were made. . . . The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.

Although this Court, in dicta, has declined to follow *Edwards*, *see Dickey* v. *CBS, Inc.*, 583 F.2d 1221, 1225-26 (3d Cir. 1980), other federal courts have, as a matter of federal law, expressed

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36 The way a plaintiff frames the allegations of defamation determines what factual allegations a truth defense requires. *See* W. Prosser, *supra* note 3, at 798. Pape did not allege that the "gist" or "sting" of the Time article was that he was guilty of brutality, but rather that Time defamed him by falsely asserting that the Commission charged that Pape was guilty of brutality. The case thus did not implicate the fair report privilege, since the object of the privilege—to put in issue the truth of the report that a third party defamed the plaintiff, rather than the truth of the underlying defamation—had been attained by virtue of how Pape framed his case. For a more thorough discussion, see Sowle, *supra* note 22, at 501-08.

reluctance to hold the press responsible for publication of defamatory statements originally uttered by others.[37] Moreover, the concerns underlying *Pape* and *Edwards* are heightened when the source of newsworthy defamation is a government official or report.[38]

We are careful to point out that we do not decide at this time that the First Amendment immunizes a newspaper's republication of a defamation arising in connection with a matter of public interest, and originally authored by a government source. But we believe that the solicitude that both the Supreme Court and other federal tribunals have expressed for the press in such circumstances might well influence the Pennsylvania Supreme Court's application of its common law privilege of fair report.[39] The trend of federal case law strengthens our

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37 *See Medina* v. *Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971); *Oliver* v. *Village Voice, Inc.*, 417 F. Supp. 352, 238 (S.D.N.Y. 1976); *Novel* v. *Garrison*, 338 F. Supp. 977, 982-83 (N.D. Ill. 1971).

38 The news report at issue in *Dickey* involved a defamation originally uttered by a public official, but one speaking in a personal rather than in an official capacity. *See* 583 F.2d at 1222-23. Plaintiff in *Dickey* admitted that he was a public figure and could prevail on his defamation claim only if he satisfied the *New York Times* standard of "actual malice," *see* note 25 *supra*. The Third Circuit affirmed the district court's holding that plaintiff had failed to satisfy his burden of proof on this issue. *Id.* at 1227-29. The court's discussion of *Edwards* v. *National Audubon Society, Inc.*, was thus irrelevant to its decision.

39 Since the Supreme Court's decision in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 680 (1964), Pennsylvania cases frequently have taken account of constitutional principles while fashioning common law rules of defamation law. The result is that "no rigid line of demarcation may be maintained between state law rules and constitutional norms, for both are intermixed in the Pennsylvania precedents." *Pierce* v. *Capital Cities Communications, Inc.*, 576 F.2d 495, 502 (3d Cir.), *cert. denied*, 439 U.S. 861, 99 S. Ct. 181, 58 L.Ed. 2d 170 (1978). For an illustration, see *Matus* v. *Triangle Publications, Inc.*, 445 Pa. 384, 395, 286 A.2d 357, 362-63 (1971), where the Pennsylvania Supreme Court, following the decision on *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 91 S. Ct. 1811, 29 L.Ed. 2d 296 (1971), engrafted onto Pennsylvania law the rule that the *New York*

belief that the Pennsylvania Court, if confronted with the question, would find the Time article that Medico challenges within the ambit of the privilege.

V.

Once the libel defendant establishes the existence of a "privileged occasion" for the publication of a defamatory article, the burden returns to the plaintiff to prove that the defendant abused its privilege. *Sciandra* v. *Lynett*, 409 Pa. 595, 601, 187 A.2d 586, 589 (1963). Pennsylvania recognizes two forms of "abuse": the account of an official report may fail to be fair and accurate,[40] as when the publisher overly embellishes the account, *Binder* v. *Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53, 56 (1971); *Sciandra* v. *Lynett*, 409 Pa. at 600, 187 A.2d at 589; or the defamatory material may be published for

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Times knowing or reckless falsity standard applies in a civil libel action brought by a private individual for defamatory falsehoods uttered in a news broadcast about the individual's involvement in an event of public or general interest.

40 Placement on the plaintiff of the burden of demonstrating that a privileged report was not fair and accurate traditionally distinguished the fair report privilege from the truth defense, in which defendant bore the burden of proving truth, *see Corabi* v. *Curtis Publishing Co.*, 441 Pa. 432, 449-50, 273 A.2d 898, 908-09 (1971). After *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974), it is doubtful that a state can place the burden of proving truth on the defendant. *Gertz* held that a plaintiff in a defamation action must be required to demonstrate "fault" on the part of defendant, *id.* at 347, 94 S. Ct. at 3010, and rejected Justice White's suggestion, offered in dissent, that a publisher may be required to prove the truth of a defamatory statement concerning a private individual, *id.* at 347 n.10, 94 S.Ct. at 3010 n.10. We have earlier questioned whether Pennsylvania's placement of the burden of proving truth on the defendant survives *Gertz*, *see Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 274 n.49 (3d Cir. 1980), and at least one member of the Pennsylvania Supreme Court has expressed similar reservations, *see Moyer* v. *Phillips*, 462 Pa. 395, 341 A.2d 441, 447 (1975) (Roberts, J., concurring). *But see* Eaton, *supra* note 33, at 1381-86, 1429 (*Gertz* tolerates common law rule of presuming falsity of defamatory publication, and placing on defendant burden of proving truth).

the sole purpose of causing harm to the person defamed, *id.* Inasmuch as Medico does not allege that Time published its article for the purpose of harming him, the sole issue with respect to abuse of privilege is whether the district court erred in concluding that there was no genuine question whether Time's publication fairly and accurately summarized the FBI materials concerning Medico.

We agree with the district court that nothing in the record suggests that the Time article unfairly or inaccurately reported on the FBI materials. Medico asserts that Time's failure to mention the legend on the FBI report on the Philadelphia Branch of La Cosa Nostra renders its story unfair. No similar legend, however, appears on the FBI's personal file card on Medico, which is an independent source of the information reported. Moreover, nothing in the Time article expresses a "recommendation" or "conclusion" on the part of the FBI concerning Medico's participation in Mafia activities. The article simply says that FBI "agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family."

Medico also insists that, because the FBI files identify the "informant" only by a code name, it is impossible to ascertain whether Time's summary was accurate. But the uncontradicted affidavits of Breen and Collins establish that the code names refer to electronic listening devices that the FBI planted in the Philadelphia area. Time has accurately portrayed the FBI records as indicating that Medico has been identified as part of the Bufalino crime family.

VI.

Medico further contends that Time can avail itself of the fair report privilege only if it actually based its article on the FBI materials; if the report reflects the contents of the official materials merely by coincidence, the privilege does not attach. Medico maintains there is a genuine issue of fact whether Time employees worked with the FBI materials in preparing the article.

Pennsylvania law squarely contradicts this argument. In *Binder* v. *Triangle Publications, Inc.*, 442 Pa. 319, 275 A.2d 53

(1971), a newspaper printed an allegedly libelous article that purported to summarize testimony at a criminal trial. The reporter who wrote the article had not attended the trial, however, but had based his story on information supplied by persons who had attended. The Pennsylvania Supreme Court held the story was nonetheless privileged. It said: "How a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question." *Id.* at 327, 275 A.2d at 58. In the present case, then, how Time magazine obtained its knowledge of the FBI materials is irrelevant under the law of Pennsylvania.[41] The article is privileged as a fair and accurate summary of the FBI materials.

VII.

We conclude that Time's publication of an allegedly defamatory article concerning Philip Medico falls within the scope of the Pennsylvania common law privilege of fair report, and that Medico has failed to establish a genuine issue of fact concerning a possible abuse of the privilege. We therefore find it unnecessary to address Time's alternative argument for affirmance: that the affidavits it submitted establish the substantial

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41 Medico cites *Kilian* v. *Doubleday & Co.*, 367 Pa. 117, 79 A.2d 657 (1951), as establishing that, in order to be privileged as true or as a fair report, a defamatory statement must be based on the personal observations of the speaker. Medico's reliance is misplaced. In *Kilian*, the author had written his story in the first person; although he based his portrayal of events on the reports of other people, he wrote the story as though he had witnessed the events himself. Thus, his story carried "the verisimilitude naturally to be expected from the author's statement that he himself witnessed such occurrences, as distinguished from assertions made on the basis of hearsay." Under these circumstances, the Pennsylvania Supreme Court indicated that the defendant could prevail on his truth defense only by establishing the events related. By contrast, the authors of the Time article made no claim to have heard the FBI recordings they reported. *Kilian* does not suggest that a defense of truth or privilege requires that the story be based on personal observations of the author, when the account makes no claim to first-hand knowledge.

truth of its publication. In particular, we need not examine the issue, left unresolved by the district court, whether under Pennsylvania law repetition of another's words relieves the press of the need to prove the truth of the underlying assertion as long as it accurately ascribes all it says to the original utterer.[42]

The judgment of the district court granting Time's motion for summary judgment will be affirmed.

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42 The possible interpretations of Time's publication about Medico may be used to illustrate the different approaches to the truth defense. The Time article is subject to at least three constructions:

A. Medico is a Mafia *capo*.

B. Government agents overheard Bufalino describe Medico as a Mafia *capo*.

C. FBI records indicate that government agents overheard Bufalino describe Medico as a Mafia *capo*.

Under the fair report privilege, the accuracy of C relieves Time of liability. If the privilege did not apply, however, we would have to ascertain whether Pennsylvania law would exonerate Time on the basis of the truth defense if Time established the truth of B, or whether Time would have to prove A. In light of our holding that Time's publication comes under the fair report privilege, we need not dispose of this question. In addition, we need not review the district court's determination that Time has failed to demonstrate the truth of either A or B.

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Pennsylvania Supreme Court Decision In
Binder* v. *Triangle Publications, Inc.

Supreme Court of Pennsylvania.

March 18, 1971.

Neil BINDER and Carolyn Binder,

Appellants,

v.

TRIANGLE PUBLICATIONS, INC.

Robert Baer Cohen, Abrahams & Loewenstein, Philadelphia, for appellants.

Harold E. Kohn, David H. Marion, Barney B. Welsh, Philadelphia, Harold E. Kohn, P.A., Philadelphia, of counsel, for appellee.

Before
JONES, COHEN, EAGEN, O'BRIEN, ROBERTS, and POMEROY, JJ.

OPINION OF THE COURT

ROBERTS, Justice.

The controlling issue presented in this appeal is whether a news story headlined "Slay Trial Bares Story of Bizarre Love Triangle" published by the Philadelphia Daily News is actionable as libel or is privileged as a matter of law either as a fair and accurate report of a judicial proceeding or as a constitutionally protected publication under the First Amendment. We affirm the granting of defendant-appellee's motion for summary judgment.

No dispute exists as to the facts surrounding the alleged libel. On July 8, 1968, a trial commenced in the Philadelphia

Court of Common Pleas to determine whether William McClurg was guilty as charged of the murder of James McClure, who had died on the morning of June 24, 1967, from gunshot wounds of the chest.[1] David Racher, a reporter for the Daily News, was assigned to cover the McClurg trial. Due to other assignments, he did not remain in the courtroom throughout the first day. Rather, at his request the prosecuting attorney, Anthony Bateman, telephoned him at home on the evening of July 8, 1968, and summarized for Racher the day's proceedings, which included Bateman's opening statement to the jury and the testimony of the first Commonwealth witness, Robert Diehl.

Racher then telephoned the night city editor with his story. The article was assigned to a rewrite man, Thomas A. Fox, Jr., who proceeded to compose the story based on Racher's facts. The article appeared the following day and is set forth in its entirety in the margin.[2]

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1 McClurg was eventually found "Not guilty" by the jury. *See* discussion infra, p. 57.

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"SLAY TRIAL BARES STORY OF
BIZARRE LOVE TRIANGLE
By Dave Racher

"A jury of nine women and three men is hearing the murder trial of William McClurg, a truck driver charged in a fatal shooting growing out of a bizarre love triangle.

"McClurg, 44 of Mutter st. near Cumberland, is charged with the June 24, 1967, shooting death of James McClure, Jr., 30, of 4433 Pearson st., in the rear of McClure's apartment building.

"Assistant District Attorney Anthony Bateman said the shooting climaxed a telephone quarrel between McClurg and McClure over the affections of Mrs. Carolyn Binder, 24, of 3736 Westhampton dr.

"A WITNESS, Robert Diehl, 31, of 3588 Teton rd., testified he was with McClure the night of the shooting and McClure was upset because Mrs. Binder had broken a date with him that evening.

"Diehl said he accompanied McClure on a round of bars in search of Mrs. Binder before learning the woman was at Mickey Finn's, a midcity bistro.

"Diehl said that on learning of Mrs. Binder's whereabouts, McClure was so upset he went to her car, which was parked in the rear of McClure's apartment house, and ripped out the distributor wires.

On reading the article, appellants Neil and Carolyn Binder requested the Daily News to print a retraction, but none appeared. The Binders subsequently instituted an action for defamation and invasion of privacy, requesting $2,000,000 in punitive damages against appellee, Triangle Publications, Inc., owner of the Daily News at that time.

After pleadings and the taking of depositions, both parties asserted there was no material issue of fact and moved for judgment on the pleadings or in the alternative, for summary judgment pursuant to Rules 1034 and 1035 of the Pennsylvania Rules of Civil Procedure, 12 P.S. Appendix. A hearing was held on the motions on December 22, 1969, and on February

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"Diehl said McClure then returned to Diehl's apartment, telephoned Mickey Finn's and spoke to Mrs. Binder.

"HE QUOTED McClure as using obscenities against Mrs. Binder and saying, 'I just don't care anymore.'

"Diehl said McClure then spoke to Mrs. Binder's date, a man McClure called 'Bill.'

"Diehl said McClure told the man, 'Bill, I'm not afraid of your guns and bullets. If you're going to blow my brains out, don't do it here. These are nice people. As soon as I hang up this phone, I'm going to leave. I didn't know it was you Carolyn was with, Bill. I thought she was out with Bud.'

"Prosecutor Bateman told the jury the man McClure called 'Bill' was the defendant, McClurg. The identity of 'Bud' is not known.

"Diehl said that after the telephone call, McClure began pacing up and down in a cold sweat. He said McClure later borrowed his car and a night light attachment, apparently to repair the damage to Mrs. Binder's auto.

"McCLURE WAS SHOT to death near Mrs. Binder's car. The hood of the car was up.

"Bateman said that after the shooting, Mrs. Binder left Philadelphia with McClurg.

"In his opening address to the jury, Bateman called the victim 'a wild kind of fellow.' He said McClure had, for a time, lived with Mrs. Binder and her husband, Neal, at the Westhampton dr. address.

"Binder testified the victim had resided with him and his wife. The Binders have a 4 year-old son.

"At the conclusion of yesterday's testimony, Mrs. Binder walked across the courtroom and handed the defendant a glass of water as he was leaving.

"Binder was expected to return to the stand today."

13, 1970, summary judgment was granted in favor of Triangle Publications. This appeal ensued.

Appellants contend that the article was not privileged and also that the First Amendment does not protect appellee's publication in this instance. While we agree that the article was not absolutely privileged, we find a qualified privilege existed. Hence we need not reach the constitutional issue presented, for it is not essential to a determination of this case. See Nelson v. Miller, 373 F.2d 474 (3d Cir.), cert. denied, 387 U.S. 924, 87 S. Ct. 2042, 18 L. Ed. 2d 980 (1967); Lynch v. Owen J. Roberts School District, 430 Pa. 461, 244 A.2d 1 (1968); Shuman v. Bernie's Drug Concessions, Inc., 409 Pa. 539, 187 A.2d 660 (1963); Altieri v. Allentown Officers' and Employees' Retirement Board, 368 Pa. 176, 81 A.2d 884 (1951).

All communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse. See Taliaferro v. Sims, 187 F.2d 6 (5th Cir. 1951); In re Universal Lubricating Systems, 150 F.2d 832 (3d Cir.), cert. denied, Stockholders' Committee of Universal Lubricating Systems v. Staley, 326 U.S. 744, 66 S. Ct. 58, 90 L. Ed. 444, rehearing denied, 326 U.S. 808, 66 S. Ct. 138, 90 L. Ed. 493 (1945); Greenberg v. Aetna Ins. Co., 427 Pa. 511, 235 A.2d 576 (1967), cert. denied, Scarselletti v. Aetna Cas. and Sur. Co., 392 U.S. 907, 88 S. Ct. 2063, 20 L. Ed. 2d 1366 (1968); Thompson v. McCready, 194 Pa. 32, 45 A. 78 (1899); cf. Sciandra v. Lynett, 409 Pa. 595, 187 A.2d 586 (1963). Thus, statements by a party, a witness, counsel, or a judge cannot be the basis of a defamation action whether they occur in the pleadings or in open court.

The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court, and to counsel to enable him to best represent his client's interests. Likewise, the privilege exists because the courts have other internal sanctions against defa-

matory statements, such as perjury or contempt proceedings. See generally, Prosser, Torts, § 109 (3d ed. 1964); Developments in the Law—Defamation, 69 Harv. L. Rev. 875 (1956).

However, this absolute privilege does not apply to newspaper accounts of judicial proceedings, for none of the policy considerations noted above are applicable to a news story. Rather, a newspaper possesses a qualified privilege to make a fair and accurate report of the proceedings, and if the article is not published solely for the purpose of causing harm to the person defamed, no responsibility attaches, even though the contents of the article are false or defamatory. See Corabi v. Curtis Publishing Co., Pa., 273 A.2d 899 (1971); Sciandra v. Lynett, supra, 409 Pa. at 600, 187 A.2d at 589; Williams v. Kroger Grocery and Baking Co., 337 Pa. 17, 10 A.2d 8 (1940); Restatement, Torts § 611.

A qualified privilege is one that can be lost by abuse, such as overly embellishing an account of a proceeding. See Corabi v. Curtis Publishing Co., supra, 273 A.2d 899; Sciandra v. Lynett, supra, 409 Pa. at 600, 187 A.2d at 589; Boyer v. Pitt Publishing Co., 324 Pa. 154, 188 A. 203 (1936).

Thus, our inquiry in this case is directed to whether the Philadelphia Daily News account of the first day of the trial is fair and accurate. It is not essential that the newspaper set forth the judicial proceedings verbatim. A summary of substantial accuracy is all that is required. Sciandra v. Lynett, supra, 490 Pa. at 600, 187 A.2d at 589. Prosser, supra, § 110.

The first day of trial included the opening statement of the prosecuting attorney, Bateman, and testimony of six Commonwealth witnesses.[3] At the outset, Bateman outlined the Commonwealth's theory of the killing, which was that the deceased had been slain in a quarrel over the affections of Carolyn

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3 The six witnesses were: Robert Diehl; Dr. Marvin Aronson, Assistant Medical Examiner; William Hadfield, who discovered the deceased's body; Officer Dennis Gibson; Raymond Lake; and Neil Binder, one of the appellants herein. The majority of the day was spent with the testimony of Robert Diehl. Neil Binder did not take the stand until the end of the day, and had merely identified himself before the trial was adjourned until the following day.

Binder. Bateman announced that he intended to prove that the deceased had lived in the same apartment with Carolyn Binder and her husband for several weeks prior to his death, but eventually the husband drove him away.[4] Bateman continued by alleging that the deceased had had a date with Carolyn Binder on the night in question, but Mrs. Binder never put in an appearance. The prosecutor further stated he would prove the deceased then became jealous and angry, and began searching and telephoning the bars with his friend Robert Diehl in an attempt to locate Mrs. Binder.

Bateman also alleged that the deceased eventually found Mrs. Binder and had a lengthy and heated telephone conversation with her and defendant McClurg, with whom she had been all evening. The prosecution concluded by summarizing the various events that led up to a supposed confrontation between the deceased, McClurg, and Carolyn Binder.

Robert Diehl was the first Commonwealth witness to take the stand. He testified that the deceased had a date with Carolyn Binder the evening of the night he died, which was not kept. He told of the deceased's frustration and anger, for the deceased apparently believed she was out with someone named

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4 The Daily News article attributes this information to Binder. Actually, it was Bateman who made the statement. We do not find this error in any way material; Binder testified the following day that the deceased had indeed lived with them for several weeks.

The other inaccuracy in the article which has come to our attention is the reported quote of Diehl's testimony as to what the deceased had told "Bill." The notes of testimony disclose the following:

> "A. [Diehl] * * * And he [McClure] said, 'Look, Bill, guns and bullets don't scare me no more.' He said, 'If you want to come up and blow my brains out, come on ahead.'
>
> * * * * *
>
> "Q. What did he say?
>
> "A. He said, 'If you want to come up here and blow my brains up, but,' he said, 'don't do it in this house. These people are too nice.' He said, 'Do it some place else.' And he kept apologizing some more. And he said, 'I didn't know it was you, Bill. I am sorry.' "

When compared with the conversation as reported by Racher, we again find no legally substantial inaccuracy.

Bud Kola. He also recounted their search of the bars for Mrs. Binder, and the angry telephone conversation. Although, according to Diehl, the deceased was relieved to find Mrs. Binder was not with Bud Kola, heated words and threats were still exchanged between the deceased and McClurg.

Appellants stress that the jury acquitted McClurg, and that therefore none of the above described events may have, in fact, occurred. Yet, as noted above, the truth or falsity of the underlying facts in the article do not affect the privilege so long as the story was a fair and accurate summary of the judicial proceedings. See Sciandra v. Lynett, supra, 409 Pa. at 600, 187 A.2d at 589.

Here, the only portion of the article which even arguably abuses the qualified privilege is the phrase "bizarre love triangle." Yet, certainly the prosecuting attorney's opening statement provided ample foundation for terming the situation a "love triangle".

We are brought then to the word "bizarre". "Bizarre" is pertinently defined in Webster's New International Dictionary of the English Language (2d ed. 1954) as "[s]trikingly out of the ordinary or out of keeping, esp. as to fashion, design, color, or the like * * * involving sensational contrasts or striking incongruities."

We do not believe it is unfair or inaccurate to describe the situation as presented by the prosecuting attorney in his opening statement as "bizarre". The unusual aspect of the case as viewed by the Commonwealth was that the love triangle existed not between a husband, wife, and lover, but rather between a wife and two, or possibly three, paramours. This coupled with the fact that one of the alleged lovers (the deceased) lived with Mrs. Binder and her husband for several weeks is sufficient to provide a fair factual foundation for the Daily News' characterization of the situation as a "bizarre love triangle". An action for defamation cannot be premised solely on defendant's style or utilization of vivid words in reporting a judicial proceeding. As was stated in Sellers v. Time, Inc., 299 F. Supp. 582 (E.D. Pa. 1969), aff'd, 423 F.2d 887 (3d Cir. 1970), cert. denied, 400 U.S. 830, 91 S. Ct. 61, 27 L. Ed. 2d 61 (1970): "We

disagree with the plaintiff's contention that the article loses it privilege by reason of the alleged 'flippant' and 'smart alecky' style of writing which was utilized by Time to create reader interest." Id. at 585.

Appellants also urge that liability be imposed because the Daily News reporter did not attend all of the trial but rather received his information from the prosecuting attorney. We are not persuaded.

Racher did not act unreasonably, for he had found Bateman to be a reliable source in the past. Additionally, how a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question.

The order of the Court of Common Pleas of Philadelphia granting summary judgment is affirmed.

COHEN, J., did not participate in the decision of this case.

BELL, C.J., absent.

No. 82-1527

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE ASSOCIATED PRESS,

Petitioner,

v.

CHARLES J. BUFALINO, JR.,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

This libel case involves certain news stories published by The Associated Press disclosing contributions to Governor Thornburgh's election campaign. Governor had run a successful election campaign on a reform platform. The stories disclosed that individuals with alleged mob ties were among the contributors to that campaign.

Respondent, Charles J. Bufalino, Jr., a highly reputable attorney from the small community of West Pittston, Pennsylvania, was among those alleged to have mob ties. Respondent was identified as a relative of Russell Bufalino, a notorious underworld figure who is a convicted felon.

The reporter who wrote the story relied solely on the information provided by two reporters in the vicinity of West Pittston, respondent's community, as to the fact that Charles Bufalino and Russell Bufalino were related. The reporter checked with certain sources in the employ of the Pennsylvania Crime Commission, who confirmed the familial relationship and added that respondent had represented as an attorney certain individuals suspected of involvement in organized crime.

This was the total of the reporter's information on which he based the damaging story. Less than two weeks later The Associated Press circulated a corrective, withdrawing the allegation of family relationship, but not the allegation of mob ties.

After the case was filed, and following a broad and frantic search by petitioner, it appeared that there existed certain decades-old reports that suggested a relationship between respondent and Russell Bufalino. Also it emerged

that respondent was Borough Solicitor for West Pittston, an appointive part-time office, and functioned solely by providing legal advice to the Borough Council. The investigation also disclosed that respondent, as a private attorney, had represented certain people who were suspected of being involved in criminal activities.

The District Court granted summary judgment based on these facts on the basis of the Pennsylvania fair report privilege and on the basis of the *New York Times v. Sullivan* rule. The Court of Appeals for the Second Circuit reversed on the basis that the reporter did not rely on the privilege, and on the basis that respondent was not identified as a public official in the news stories that defamed him.

The defense of truth is not involved in these proceedings.

As against this background, the questions presented by respondent are:

1. Is every small-town, part-time appointed public official within the scope of the *New York Times v. Sullivan* rule in the absence of a showing that he has any influence on policy or governmental matters and where his function is limited solely to providing legal advice?

2. May the *New York Times v. Sullivan* rule apply under the circumstances set out in the preceding question where the lawyer's part-time public official role is not mentioned in the libelous publication, is unknown to the defendant at the time of publication, and is not generally known in the community?

3. May an oral disclosure by a lower level official who insists on remaining anonymous be characterized as an official report of the agency employing such official for First Amendment purposes?

4. Whether this Court wants to become involved in a matter that is, in essence, an appeal to the Supreme Court from a denial of summary judgment to a litigant?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE ASSOCIATED PRESS,

Petitioner,

v.

CHARLES J. BUFALINO, JR.,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF FACTS

Respondent Charles J. Bufalino, Jr. is an attorney practicing law in his native town of West Pittston, Pennsylvania, where his father had also been an attorney in private practice. West Pittston is in eastern Pennsylvania, in the vicinity of Scranton and Wilkes-Barre, and is a Borough populated by about 8,000 residents. West Pittston is a former coal mining area, and many of its residents are of Italian ancestry.

There is substantial evidence in the Court below that respondent is highly regarded in his community as an individual of good moral character as to both his public and private life, and a civic leader and a most reputable member of his community.

On December 8, 1978 there appeared a news item in a local daily newspaper, the Scranton Times, identified as having originated with petitioner The Associated Press, as follows in pertinent excerpt:

Backer's List Surprises Thornburgh -

> Harrisburg (AP)—Governor-elect Richard L. Thornburgh, who rose to fame by battling organized crime, accepted political contributions from several individuals with alleged mob ties, according to his campaign records . . .
>
> Among the 14,000 contributors listed by Thornburgh were:
>
> . . . Charles J. Bufalino, Jr., an attorney who is related to Russell Bufalino, described by the Crime Commission as a Mafia boss. He gave $120.00.

Rewrites of this same news story appeared during the next several days in the Scranton Times and the Wilkes-Barre Times Leader Evening News, both newspapers of general circulation in the West Pittston area, excerpts of which are as follows:

Thornburgh Plans Fund Return to 3

> Harrisburg (AP)—Governor-elect Richard L. Thornburgh will return campaign contributions to three individuals who allegedly have ties to organized crime figures . . . "we are looking into whether Bufalino has documentable links to organized crime but as of today we have been unable to determine that . . . .

> Bufalino, an attorney, is related to Russell Bufalino, identified by state and federal agencies as a Mafia boss now in prison . . . ."

It is noted that the stories made no reference to respondent occupying a public office, and that the phrase "documentable links to organized crime" states the understanding of Governor-elect Thornburgh's staff as to the intendment or thrust of the news articles.

About two weeks later, and under date of December 21, 1978, The Associated Press published a so-called corrective as follows:

> "Associated Press reported erroneously on December 8 that Charles Bufalino, Jr. was related to Russell Bufalino, who had been identified by the Pennsylvania Crime Commission as an organized crime leader in northeastern Pennsylvania.
>
> The error appeared in a story about disclosure of campaign contributions by Governor-elect Thornburgh and Democratic candidate Peter F. Flaherty.
>
> Two members of the Crime Commission staff had said that the Bufalinos were related.
>
> There is no evidence that Charles and Russell Bufalino are related."

It is noted that the so-called "corrective" of December 21, 1978 did not retract the "mob ties" allegations of the earlier news stories. These news stories were transmitted by petitioner to all of their member-subscribers in Pennsylvania, comprising the major newspapers within the state.

Being deeply offended by the defamation explicitly set out in the dispatches of The Associated Press, respondent filed this diversity action for libel against petitioner in the United States District Court for the Southern District of New York.

Pre-trial discovery together with a massive investigation by The Associated Press disclosed the following facts, all of which are of record in the proceedings below:

1. There is another Bufalino family that has lived in the Scranton-Wilkes-Barre area, unrelated to respondent's family. A member of that family, Russell Bufalino, has acquired considerable notoriety as an organized crime figure. Russell Bufalino is a convicted felon.

2. The stories in issue were prepared by a reporter in petitioner's employ named Paul Carpenter. At the time the stories were written and transmitted Carpenter had little, if any, knowledge about respondent. He testified that he wrote the offensive news stories based on two facts: (a) That respondent was related to Russell Bufalino, although the nature of the claimed relationship was not disclosed, and (b) that respondent had, in the past, represented as an attorney some clients believed by the Pennsylvania Crime Commission to have been involved in organized crime. According to Carpenter, these two "facts" were sufficient to justify the allegation of mob ties.

The above two facts represented the total of Carpenter's knowledge concerning respondent.

3. Carpenter invoked the provisions of the Pennsylvania Shield Law in refusing to disclose the identity of his informants with the Pennsylvania Crime Commission, as they had allegedly requested to remain anonymous. Carpenter described his informants as "officials," which would apparently include a large category of Crime Commission personnel.

4. The Pennsylvania Crime Commission publishes an official report each year, disclosing the results of their investigative efforts. Respondent has never been mentioned in such official reports.

5. Insofar as the alleged family relationship is concerned, there had been confusion before in certain records as to Russell Bufalino's relatives. The report of an FBI interview with Russell Bufalino while the latter was in custody containing erroneous information was introduced and relied upon by petitioner below. This record is in the nature of a "raw file" of the FBI. Respondent submitted below a carefully constructed genealogy chart that demonstrates the lack of any familial relationship as between Russell Bufalino and respondent. This, together with the corrective" retraction above noted, places the relationship issue in controversy below.

More importantly, the reporter Carpenter was unaware of the existence of such older records, such as they are, when he wrote his news stories.

6. In addition to his law practice which provides his livelihood, respondent is Borough Solicitor for West Pittston. This is a part-time, appointive position, from which respondent is paid about $3,500 per year. Respondent's activities in this regard are limited to providing legal advice at Borough Council meetings, and on request from that body.

The record as to the precise nature of respondent's activities as Borough Solicitor was not well developed for the purpose of the summary judgment proceedings below. There is no evidence that respondent makes any contribution as Borough Solicitor other than providing legal advice on an as-needed basis. And, once again, petitioner's agents in the publication of the libelous news reports had no knowledge or awareness of respondent's professional services to the Borough Council of his community.

ARGUMENT

I.

THIS CASE IS NOT IN AN APPROPRIATE POSTURE FOR REVIEW BY THIS COURT.

The procedural status of the litigation is that following the District Court's granting of summary judgment such judgment has been reversed by the Court of Appeals. Therefore, the procedural posture is as if summary judgment had been denied, and the case was proceeding to trial. The decision of the Second Circuit is not final, it does not put an end to the litigation unless this Court grants the Petition for Writ of Certiorari.

This Court has had occasion to comment on the propriety of summary judgment in defamation proceedings on the issue of actual malice. *Hutchinson v. Proxmire*, 443 U.S. 111, 61 L.Ed.2d 411, 99 S.Ct. 2675 (1979) at 120, n. 9. This was also referenced in the case decided the same day, *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 61 L.Ed.2d 450, 99 S.Ct. 2701 (1979) at 161, n. 3.

Although this Court's admonitions in reference to the propriety of summary judgment cited above related to the malice issue in defamation cases, it appears on the record that summary judgment and the granting thereof by this Court by way of a reversal of the mandate of the Court of Appeals and the reinstatement of the Order of the District Court would also be most inappropriate. The fourth paragraph of the Court of Appeals decision reads as follows:

> "Judge Werker assumed certain facts to be true in rendering summary judgment for the defendant. While plaintiff disputes some of these facts, we will also assume them to be true for purposes of

> this appeal so that the correct legal standard may be stablished prior to trial. At trial plaintiff will be free to put his version of the facts to the trier. We therefore state the facts as follows."

Thus, should this Court grant the instant Petition and reverse the Court of Appeals on an issue of law predicated on assumed facts, respondent would have been denied the opportunity to have his version of the facts considered.

Indeed, the quoted excerpt strongly suggests that there was a separate and independent basis for the action of the Court of Appeals, namely, that the District Judge had acted improperly in deciding contested issues of material fact in summary judgment proceedings.

Among these contested issues is the existence of any report of official records and proceedings that would give rise to a viable claim of privilege that could be effectively asserted by petitioner. Despite the confusion in decades-old records concerning a family relationship, there is no official record or report of official proceedings that would justify the offensive charge of "mob ties" as to respondent.

Another contested issue is whether respondent has ever been referenced as a person of dubious moral character. Respondent offered cogent evidence as to this issue, tending to establish that he was a person of exemplary character. Petitioner on the other hand offered highly tenuous material on which it asked the Court below, and now asks this Court, to base a most uncertain set of conjectural inferences as to the effect that the public record, fairly interpreted, leads one to the conclusion that respondent is deserving of the description as one having mob ties.

Another contested issue is whether the off-the-record statement of an individual "official" whose desire to re-

main anonymous is respected, can ever be an official statement within the scope of the privilege. The Court of Appeals references to *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89 (D.C.App. 1980), cert. denied, 451 U.S. 989 (1981) is most apposite, however petitioner would have this Court ignore this flaw in their claim of the fair report privilege. An unattributed statement by an official simply cannot be an official statement.

Respondent's role as an attorney in private practice and the calibre of his clientele cannot be used to impute dishonor to the attorney. Yet this is precisely what Carpenter, the AP reporter, did.

Respondent is not a "mouth piece" for the mob. His practice is that typical of an attorney in a small community. No doubt he has represented clients whose moral stature leaves something to be desired.

Chief Justice Burger in his dissent in *Gertz v. Welch*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974) provided current recognition to the truism that the character and reputation of a client is not to be imputed to his lawyer. As a policy matter, the representation by respondent of individuals suspected of involvement in organized criminal activities is irrelevant. A lawyer cannot be held to risk his reputation should he represent clients suspected of criminal misconduct.

From the above it will be recognized that to permit the proceeding to go forward in this Court in its present procedural posute would be, in effect, to involve this Court in summary judgment proceedings. What is required at this point is an orderly trial, where a trial judge and jury may do the sifting and fact finding that is conventional with rulings as to proffered evidence and instructions to a jury that would afford an appellate tri-

bunal the kind of record that is customary. Contests as to the credibility of witnesses and admissibility of documents are best left to the trier of the fact.

II.

THE SIGNIFICANCE OF AN ALLEGED FAMILY RELATIONSHIP IS NOT AN APPROPRIATE ISSUE FOR THIS COURT.

The District Court, in granting petitioner's motion for summary judgment relief upon decades old "official documents" in ruling that if petitioner had known of the existence of these "official documents" it would have been privileged to publish same in reporting a family relationship as between respondent and Russell Bufalino. The District Court then employed the same documents to justify petitioner's pejorative of mob ties.

Laying to one side the issue of a possible abuse of the fair report privilege, and assuming *arguendo* that even under these attenuated circumstances the fair report privilege would protect the attribution of a familial relationship, the question arises as to whether the family relationship allegation, no matter how erroneous, may be employed to support a charge of mob ties.

Apparently the District Judge assumed that the relationship could be so used. The Court of Appeals did not rule on the question for it held that the fact that these older documents were unknown to petitioner at the time of publication precluded the employ of the privilege to immunize the defamation.

Thus, a question as to the relevance of a family relationship to mob ties lies under the surface of these proceedings. Petitioner is impliedly asking the Court to recognize a connection between the two: The family

relationship (the nature of which is not disclosed) and a somewhat horrifying conclusion of mob ties.

In an attempt to illuminate the *non sequitur*, respondent submitted an affidavit to the effect that Russell Bufalino had a cousin who was a Roman Catholic priest and pastor of a church in Sicily. Does this mean that the media may justifiably accuse the priest of mob ties?

Petitioner's summary judgment can be reinstated only if the Court adopted an unprecedented taint-by-blood hypothesis. At least one highly placed official of The Associated Press rejects such hypothesis. In a recently published book, *The News Business*, by John Chancellor and Walter R. Mears, published in 1983 by Harper and Row the following admonition appears:

> . . . The policies of news desks vary too. Those policies should protect the identities of people who might be endangered or victims who would be humiliated if names were used.
>
> This applies to relatives of people in the news. The brother of a child molester leads a blameless life. His name and address don't belong in print. Put them there and he's harmed. *The News Business*, at 116.

Walter R. Mears is a Pulitzer Prize winner and is Vice President and Washington Bureau Chief of the Associated Press.

Petitioner has, in addition, submitted a pot-pourri of additional scraps of information gleaned from their post-complaint investigation. These items, which petitioner claims to support its position, rely on a guilt by association line of attack on respondent and were disregarded by the District Court. These elements are characterized by petitioner as establishing financial, family and social ties between appellant and others identified as participants in

organized crime. The Court of Appeals did not consider this material for the reason that they were not relied upon by the reporter. Respondent's position throughout has been that much of this material is inadmissible. There has been no ruling by any Court as to the relevance and probative value of this material.

At this point petitioner presses these matters in this Court. Procedurally, this is tantamount to asking this Court to become an original trier of the fact, sifting through evidentiary submissions to determine probative value.

CONCLUSION

It would seem that what is needed at this point is the sifting and disciplined process inherent in a trial of the action. The procedural posure and the non-availability of a record of testimony and documentary proof that has survived rigorous scrutiny makes Supreme Court review inappropriate. Respondent would be deprived of the opportunity to test the submissions of petitioner offered in defense were this Court to upset the determinations of

the Court of Appeals. Alternatively, petitioner is deprived of nothing, including a further opportunity to petition the Court after trial and appellate review.

For the foregoing reasons, respondent suggests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: May 12, 1983

No. 82-1527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE ASSOCIATED PRESS,

Petitioner,

—against—

CHARLES J. BUFALINO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* BY THE NEW YORK TIMES COMPANY, NATIONAL BROADCASTING COMPANY, INC., GANNETT CO., INC., DOW JONES & COMPANY, INC., NEWSWEEK, INC., THE MIAMI HERALD PUBLISHING COMPANY, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 14, 1983

No. 82-1527

IN THE

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The *amici* are all nationally distributed news organizations (and one association of journalists that includes members throughout the nation) who join together to move the Court for leave to file a brief as *amici curiae* in support of the petition for a writ of certiorari in this case. The written consent of the petitioner, The Associated Press, has been obtained and has been filed with the clerk of this Court. The consent of the respondent, Charles J. Bufalino, Jr., has been requested and refused. As nationally distributed news organizations, and an association of news

reporters from across the country, movants believe that the decision below will harm their ability to serve the public. Movants believe that their brief *amici curiae* will aid this Court by demonstrating the inconsistency of the decision below with decisions of this Court and by clarifying the negative impact of the decision below on national news organizations.

Accordingly, movants respectfully request this Court to grant leave to file their accompanying brief in support of the petition for a writ of certiorari.

Respectfully submitted,

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OCTOBER TERM, 1982

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This brief is submitted on behalf of the New York Times Company, National Broadcasting Company, Inc., Gannett Co., Inc., Dow Jones & Company, Inc., Newsweek, Inc., the Miami Herald Publishing Company, and the Reporters Committee for Freedom of the Press, as *amici curiae*, in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit filed on behalf of the Associated Press ("AP").

Interest of *Amici Curiae*

The *amici* are publishers, broadcasters, and an association of journalists. The New York Times Company and its subsidiaries publish, *inter alia, The New York Times* and thirty newspapers around the country and own and operate television and radio stations and a cable television system. National Broadcasting Company, Inc. operates television and radio stations. Gannett Co., Inc. and its subsidiaries publish eighty-nine daily and thirty-two non-daily newspapers throughout the country and own and operate television and radio stations. Dow Jones & Company, Inc. and its subsidiaries publish *The Wall Street Journal,* twenty-one daily newspapers and one weekly magazine. Newsweek, Inc., publishes *Newsweek* magazine. The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc. publishes *The Miami Herald.* The Reporters Committee for Freedom of the Press is a legal defense and research fund devoted to the protection of the First Amendment and freedom of information rights of the working press of all media.

Each of the *amici* believes that the misreading of decisions of this Court, including *New York Times Co.* v. *Sullivan* itself, by the United States Court of Appeals for the Second Circuit will limit substantially the ability of the press to report and the public to learn about significant ongoing events of enormous public interest and concern. In addition, the summary rejection by the Second Circuit of the interpretation of Pennsylvania's official records privilege by the United States Court of Appeals for the Third Circuit introduces a new uncertainty into the federal courts' exercise of diversity jurisdiction, an uncertainty that is especially disturbing in the area of libel and that is contrary to the policies articulated by this Court and by the Second Circuit itself.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' Misinterpretation of *New York Times Co.* v. *Sullivan* Raises Important Issues Concerning the Scope of First Amendment Protection in Libel Actions That Should Be Resolved by This Court.

The constricted nature of First Amendment protection afforded by the Court of Appeals' decision is, quite simply, contrary to *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), itself, let alone later cases decided by this Court. The district court had granted summary judgment for the defendant based on its finding that plaintiff Bufalino, the solicitor of the Borough of West Pittston, Pennsylvania, was a public official as defined in *Sullivan.* Plaintiff's concession that he could not prove that the allegedly defamatory statements had been made with actual malice, as defined in *Sullivan* and its progeny, satisfied the district court that summary judgment was appropriate.

The reversal by the Court of Appeals of the judgment of the district court was bottomed on an issue neither briefed nor argued by the parties. According to the Court of Appeals, AP was not entitled to rely upon any *Sullivan* protection it might otherwise have been entitled to since it did not "directly or impliedly identify the plaintiff as a public official, and there is no showing that the plaintiff's name is otherwise immediately recognized in the community as that of a public official." (16a)[1] Thus, even if plaintiff were a public official for purposes of *Sullivan* (an issue the Court of Appeals did not reach) and even if plaintiff, as

[1] Citations herein to material printed in the Appendix to the Petition appear as "——a."

here, disclaimed any ability to demonstrate actual malice, summary judgment was held to be unavailable. The Court of Appeals expressly noted that its decision was directly contrary to that of the Massachusetts Supreme Judicial Court, *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975), and other federal decisions, *e.g., Goodrick* v. *Gannett Co.*, 500 F.Supp. 125 (D. Del. 1980). (18a)

Sullivan arose out of publication of an advertisement in *The New York Times* that made no reference by name either to the Montgomery Commissioner who supervised the Police Department or to his official position.[2] Although there was some testimony at trial that the advertisement was understood to relate to Sullivan, 376 U.S. at 258—testimony required to demonstrate that the advertisement was "of and concerning" the plaintiff—there was none that met the test established by the opinion of the Court of Appeals that plaintiff's name itself must be "immediately recognized in the community as that of a public official." (16a) There is, in fact, no reason to believe that Sullivan could have come close to meeting that test. Yet Sullivan,

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[2] The relevant language from the advertisement stated:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.
>
> * * *
>
> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . ." 376 U.S. at 257-58 (emphasis in original).

unnamed in the *Times* advertisement which led to his action, was, of course, treated as a public official.

Similarly, in *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), a case relied upon in the Court of Appeals opinion, the allegedly libelous language in question[3] made no reference even to the name of the public official. Nor was any showing whatsoever made to the effect that plaintiff's name was widely known, let alone immediately recognized, in his community as that of a public official. Yet in *Rosenblatt*, a former supervisor of a local recreation area was held to be a public official for purposes of *Sullivan* and thus obliged to prove actual malice in order to recover.

Again, in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the language at issue with respect to a deputy sheriff named Thompson was, at best, indefinite with respect to his position, and defendant made no showing of the notoriety of plaintiff within the community.[4] Nonetheless, plaintiff was

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[3] The language was as follows:

"Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.

"This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.

"On any sort of comparative basis, the Area this year is doing literally hundreds of per cent **BETTER** than last year.

"When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

"What happened to all the money last year? and every other year? What magic has Dana Beane [Chairman of the new commission] and rest of commission, and Mr. Warner [respondent's replacement as Supervisor] wrought to make such tremendous difference in net cash results?" 383 U.S. at 78-79.

[4] The language was as follows:

"Now, we knew that this safe was gonna be moved that night, but imagine our predicament, knowing of Ed's connections with the Sheriff's office through Herman Thompson, who made

held to be a public official and obliged to meet the actual malice test of *Sullivan*.[5]

Reference to cases such as *Sullivan*, *Rosenblatt* and *St. Amant* is useful not only for the narrow point for which they are cited above, but for a broader proposition that is utterly at odds with the ruling of the Court of Appeals. It is that *Sullivan* and its progeny are not to be treated, as we understand the Court of Appeals to have done, as burdensome intrusions upon the claims of individual reputation, intrusions that must virtually be confined to their facts. The theory that underlies *Sullivan* is, after all, one that welcomes "debate on public issues" that is "uninhibited, robust, and wide-open" and that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. When, as here, just such speech has been engaged in by charging one who was a town attorney with having alleged mob ties, *Sullivan* should not be read so woodenly as to deprive AP of First Amendment protection simply because it failed to identify the official in his official capacity or to demonstrate the breadth of his local notoriety.

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recent visits to the Hall to see Ed. We also knew of money that had passed hands between Ed and Herman Thompson . . . from Ed to Herman. We also knew of his connections with State Trooper Lieutenant Joe Green. We knew we couldn't get any help from there and we didn't know how far that he was involved in the Sheriff's office or the State Police office through that, and it was out of the jurisdiction of the City Police." 390 U.S. at 728-29 (footnote omitted).

[5] The Court of Appeals cited a footnote in *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300 n.4 (1971), for the proposition that this Court "has not yet ruled upon the significance of a news report's failure to identify a public officeholder as such." (17a) The footnote in *Ocala* referred to simply observed that although both the trial judge and intermediate court of appeal below had partially rested their conclusion that *Sullivan* did not apply on the ground that the plaintiff's status as mayor or candidate for county tax assessor had not been mentioned in the article, "[t]he respondent has not pursued that theory here."

Put differently, what underlies *Sullivan* is the notion that intense public debate relating to the competence of public officials is part of the "central meaning" of the First Amendment. *Id.* at 273. *See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191. If that is so, must the protections of *Sullivan* be limited to cases in which there is identification, as such, of the public officials? Or is it not far more consistent with *Sullivan* to conclude that public debate inexorably leads to more debate and that debate about Bufalino's alleged mob ties may reasonably be expected to lead to public examination of what Bufalino does and where he does it? Given the fact that *any* statements which "touch on an official's fitness for office" have long been held to be protected by *Sullivan, Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 273-74 (1971), the *amici* submit that the Court of Appeals decision's mistreatment of *Sullivan* and other decisions of this Court is worthy of review by this Court, and, upon review, reversal.

II.

The Refusal of the Court of Appeals to Defer to the Definitive Interpretation of the Pennsylvania Official Records Privilege by the Court of Appeals for the Third Circuit Is Contrary to the Principles Underlying the Proper Method of Determining State Law by a Federal Court in a Diversity Action Articulated by This Court in *Erie R.R. Co.* v. *Tompkins* and Subjects Libel Defendants to Unnecessarily Heightened Dangers of Forum Shopping.

In reversing the district court's grant of summary judgment, the Court of Appeals rejected the interpretation of Pennsylvania's official records privilege recently set forth by the Third Circuit in *Medico* v. *Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981). This occurred notwithstanding the fact that Pennsylvania is within the borders of the Third Circuit and that the Third Circuit's ruling on Pennsylvania law predated that of the Second Circuit. Such a cavalier disregard for the need for uniformity in the federal courts' interpretation of state law in diversity actions and for the increased probability of forum shopping engendered by its decision contravenes well-established decisions of this Court and a decision of the Second Circuit itself.

The district court concluded that two statements in the AP articles at issue were the subject of the complaint. One stated that plaintiff was related to an organized crime figure named Russell Bufalino, the other that plaintiff had alleged "mob ties." Based on a wide range of official documents submitted to the Court on both issues, the district judge concluded that the requirements of Pennsylvania's official records privilege had been met and that summary judgment was thus appropriate.

In its opinion reversing Judge Werker's ruling, the Court of Appeals did not suggest that the official records proffered had failed to support the language at issue. Nor did it conclude that AP's statements with respect to the official records were, to any degree, unfair or inaccurate. Instead, the Court of Appeals concluded that since AP had disclosed that its dispatch had been based upon material provided by confidential informants whom AP had refused to identify, consistent with Pennsylvania law, *no amount* of after-discovered official records could suffice to permit AP to avail itself of the privilege. The Court of Appeals explicitly and necessarily disagreed with the decision of the United States Court of Appeals for the Third Circuit in *Medico* v. *Time, Inc.*, 643 F.2d 134 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981), on the issue of whether Pennsylvania law required proof of actual reliance upon the official records produced to bring into play the official records privilege. *Medico*, which was adhered to by the district court, held no such reliance was necessary. The Court of Appeals disagreed, saying:

> "As authority for this ruling the [trial] Judge cited *Medico* v. *Time, Inc.*, 643 F.2d 134, 146-47 (3d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981). In *Medico*, the plaintiff argued that the defendant could claim the § 611 [official records] privilege only if, in preparing its report, it had actually relied upon the official document in question. The Third Circuit, citing *Binder* v. *Triangle Publications*, 442 Pa. 319, 275 A.2d 53 (1971), held for the defendant and stated that Pennsylvania law 'squarely contradicts' the argument that actual reliance is necessary.
>
> "We believe that *Medico* reads *Binder* for much more than it's worth. In *Binder*, the Pennsylvania Supreme Court held the privilege available where the defendant's reporter, who did not attend a judicial

> proceeding, based his report of the proceeding on statements given him by a third party who did attend. Said the Pennsylvania Court: '[H]ow a reporter gathers his information concerning a judicial proceeding is immaterial provided his story is a fair and substantially accurate portrayal of the events in question.' 442 Pa. at 327, 275 A.2d at 58. Taken in context, we believe this statement means only that the privilege is available where a reporter who purports to report on an official proceeding does not have personal knowledge of the proceeding but instead relies on an intermediary who does. That is, in *Binder* the reporter ultimately relied on information obtained at the official proceeding, he believed he was relying on official information, and he wrote a report purporting to summarize the proceeding. In contrast, if *Medico* is correct in holding that reliance is not required, a reporter's unsubstantiated defamatory statements, made independent of any report of public proceedings, would be privileged if after-the-fact the reporter could find some official record embodying his statements. We do not believe that the privilege should be applied to the latter situation." (10a-11a)

By its summary rejection of the determination by the Third Circuit as to the meaning of Pennsylvania law, the Court of Appeals created a situation where the location of the forum of a lawsuit may well determine its outcome. Given the *Bufalino* ruling, a federal court located in New Jersey would be bound to apply the broad *Medico* interpretation of Pennsylvania law to a libel lawsuit before it; a federal court across the river in New York, applying the same state's law, would apply a different rule. The Court of Appeals' creation of such a patchwork of precedent encouraging libel plaintiffs to choose not only between state

and federal courts but between federal courts in different districts runs contrary to the policies of fairness that this Court consistently has held should govern diversity jurisdiction. *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 747 (1980) ("discouragement of forum-shopping and avoidance of inequitable administration of the laws" are the "twin aims" of *Erie*); *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (same); *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 74-75 (1938). Indeed, the Second Circuit itself previously had recognized the difficulties inherent in such a decision in *Factors, Etc., Inc.* v. *Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). In *Factors*, the Court of Appeals was confronted in a diversity case with an issue of Tennessee law. Based on the principles governing the exercise by the federal courts of post-*Erie* diversity jurisdiction, the Court of Appeals held that a decision of the Court of Appeals for the Sixth Circuit, whose boundaries include Tennessee, on the same issue of Tennessee law as was before the Second Circuit should be accorded conclusive deference. *Factors* was not cited or discussed in the opinion of the Court of Appeals in this case.

The dangers of inequity and forum shopping engendered by the Court of Appeals' opinion are heightened in the area of libel where lawsuits, under current law, may be brought in almost any forum that a plaintiff chooses. *Cf. Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d 33 (1st Cir. 1982), *cert. granted*, 103 S.Ct. 813 (1983); *Jones* v. *Calder*, 138 Cal.App.3d 128, 187 Cal.Rptr. 825 (1982), *petition for cert. pending*, 51 U.S.L.W. 3651 (U.S. Feb. 22, 1983). This aspect of the Court of Appeals' ruling is particularly troubling to the *amici*, who are currently subject to lawsuits in many different forums based on their nationwide distribution. It is risky enough to be subjected to libel litigation under the varying laws of fifty states; it is all

but absurd if the interpretation of each state's law is to differ from one federal court to another with no deference to a ruling of a Court of Appeals as to the law of a state within its boundaries. By substituting its own view of Pennsylvania law for that of the Third Circuit, and ignoring this Court's rulings that interpretations of state law by federal judges located in that state and presumably more familiar with that state's law are entitled to special deference, *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944); *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 280 (1942) (per curiam), the Court of Appeals has added a new twist to the old *Erie* knot, one that can be unraveled only by review by this Court.

CONCLUSION

For the foregoing reasons, the petition of AP for a writ of certiorari should be granted.

Respectfully submitted,

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